No. 87-760

Supreme Court, U.S.
FILED
OCT 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WALTER S. KIRIMITSU
HENRY N. KITAMURA
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
(808)524-5803
Counsel for Petitioners

Of Counsel:

SHIM, TAM, KIRIMITSU,
KITAMURA & CHANG

October 21, 1987

154 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in holding that a vessel owner who turned over improperly maintained equipment to the stevedore would be liable to the injured longshoreman only if it was foreseeable that the dangerous condition would not be remedied by the longshoreman and that the longshoreman would continue to work despite the dangerous situation.

2. Whether the Ninth Circuit Court of Appeals erred in holding that there was no reason for a repairman to foresee that a longshoreman would endanger himself by climbing to the top of the 16 foot barge door to untangle the door cables, thereby placing himself in danger of falling if the turnbuckle disengaged itself from the cable.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....2

JURISDICTION.....4

STATUTES INVOLVED.....5

STATEMENT OF THE CASE.....6

REASONS FOR GRANTING THE WRIT.....12

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THIS COURT.....12

A. The Ninth Circuit's Decision Misinterpreted This Court's Holding in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed 2d (1981).....12

B. Knowledge of Defect Implied Where Defect Existed From Outset.....20

II. FORESEEABILITY OF PRECISE INJURY NOT NECESSARY FOR LIABILITY.....23

CONCLUSION.....26

APPENDICES PAGE

Appendix A. District Court's Finding of Fact, Conclusions of Law and Order for Judgment Filed June 10, 1986.....A-1

Appendix B. Ninth Circuit Court Court of Appeals Memorandum Filed July 23, 1987.....A-19

Appendix C. Trial Transcript of Proceedings.....A-38

TABLE OF AUTHORITIES

CASES	PAGE(S)
Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355 (9th Cir. 1983)	18
Munsey v. Webb, 231 U.S. 150, 34 S. Ct. 44, 58 L.Ed 162 (1913)	23,24, 25
Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 256, 101 S. Ct. 1614, 48 L.Ed2d 1 (1981	12,13, 20,21,
Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952)	24

STATUTES

28 U.S.C. § 1254(1)	4
Harbor Worker's Compensation Act	
33 U.S.C. § 905(b)	5

No._____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Donald L. Kong and May S. Kong respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit entered in these proceedings on July 23, 1987.

OPINIONS BELOW

Petitioners filed an amended complaint against Respondents Hawaiian Marine Lines, Inc. (hereinafter referred to as "HML"), Willamette Iron and Steel Company and Guy F. Atkinson Company (hereinafter collectively referred to as "WISCO"), to recover damages for injuries received by Petitioner Donald L. Kong (hereinafter referred to as "Plaintiff") when he fell from the top of the barge door while attempting to untangle the cables used to open and close the barge doors. The Honorable Charles L. Hardy, visiting Judge for the United States District Court for the District of Hawaii, granted WISCO's Motion to Dismiss under the "accepted work" doctrine. The District Court also held, in its unpublished Findings of Fact and Conclusions of Law, that HML was not

negligent because the barge was in a condition that the longshoreman could carry out the cargo operations in reasonable safety, and HML could not foresee that the end of the cable had unscrewed from the turnbuckle and that there was no locking wire to prevent the cable from separating from the turnbuckle. Plaintiff, thereafter, made a timely appeal to the Ninth Circuit Court of Appeals.

On July 23, 1987 the Ninth Circuit Court, by an unpublished Memorandum Opinion, affirmed the Order and Judgment of the District Court. The Ninth Circuit Court held that although the District Court erred in adopting the "accepted work" doctrine, it correctly dismissed the claim against WISCO because WISCO could not have foreseen that Plaintiff would climb up the barge door and attempt

to untangle the cables, and thereby fall and injure himself when the turnbuckle separated from the cable. The Ninth Circuit Court further held that HML was not liable because it could not reasonably foresee that manually untangling the cables would cause the cable to separate from the turnbuckle, thereby allowing the cable to disengage itself from its stationary position and causing injury to Plaintiff.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 23, 1987. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The claims filed in this case were made under the authority of the Longshore and Harbor Worker's Compensation Act, as set forth in 33 U.S.C. § 905(b). Said section 905(b) provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or

against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

Plaintiff was employed by a stevedoring company as supervisor for the loading and unloading of vessels. On the date of the accident, December 24, 1980, Plaintiff was assigned to supervise the loading of the barge called "Oahu", which was owned by HML. The doors of the barge refused to close because the cables at the top of the doors, which opened and closed the doors, were jammed. Plaintiff climbed to the top of the doors, which were approximately sixteen (16) feet high, to untangle the jammed cables by shaking the same. As Plaintiff shook the

cable the cable came loose from the starboard turnbuckle and caused Plaintiff to lose his balance and fall to the deck of the barge. The cable and turnbuckle were examined after the accident and it was found that the turnbuckle had separated from the cable because there was no locking wire on the turnbuckle to prevent the turnbuckle from separating from the cable. (App. A, pgs. A-1--A-12; App. C, pgs. A-78--A-79).

The doors on the barge were designed to be opened and closed by a manual winch. Prior to the accident, HML taught the longshoremen to open and close the barge doors by the use of a forklift because such method was fifteen (15) minutes faster than the manual winch method. It was to the benefit of HML to finish the job faster because it paid for the cost of loading the barge by the

longshoremen. (App. C, pgs. A-39--A-42, A-51--A-54, A-64--A-67, A-81--A-86). The forklift method, however, made the cable at the top of the barge doors to slack and this caused the cable to jam unless the slack was picked up by the manual winches. On the day of the accident, the wheel to turn the manual winches could not be found. (App. C, pgs. A-42--A-45, A-47--A-51, A-62--A-64, A-67--A-71).

Prior to the accident, HML knew that the cable lines could be tangled when the forklift method was used to close the barge doors because on two occasions the operations manager of HML, Marlin Pulliam, climbed the barge doors to untangle the jammed cables. (App. A, pgs. A-1--A-8). Also, Pulliam's substitute, Frank Yuen, knew that the cable lines had jammed on several occasions, prior to the accident, when the forklift method was

used. (App. C, pgs. A-104--A-107). Since HML owned and controlled the equipment that opened and closed the barge doors, it had the duty to see that the equipment was properly maintained and in good working order. (App. C, pgs. A-99--A-102).

Pulliam, as manager of HML, was responsible for the inspection, maintenance and repair of the barge and its equipment. Each time the barge docked in Honolulu, Pulliam visually inspected the equipment on the barge - the winches, cables, eyebolts and turnbuckles on the cables and he made sure that the threads inside the barrel of the turnbuckle were secured to the cables so that the turnbuckle would not separate from the cable. But when the barge Oahu docked in Honolulu when the accident occurred, on December 22-24,

1980, Pulliam was on vacation in Portland, Oregon. (App. C, pgs. A-56--A-64, A-71--A-76, A-86--A-91). His replacement, Frank Yuen, was a sales representative and he was not familiar with the barge equipment and had no training on the inspection and maintenance of the equipment. While the barge was in Honolulu on December 22-24, 1980, Yuen did not do any inspection or maintenance work on the barge cables or turnbuckles attached to the cables. (App. C, pgs. A-93--A-104).

According to Bruce Wong, HML's expert, it was an industry standard to secure the turnbuckle with lock wires so that the turnbuckle would not become detached from the cable. Mr. Wong indicated that a turnbuckle would be improperly assembled if it was not equipped with lock wires. (App. C, pgs.

A-45--A47, A-115--A-118).

Prior to the accident, in October 1980, the cables and turnbuckles on the barge Oahu were replaced by WISCO in Portland, Oregon. After the cables and turnbuckles were replaced the barge was put back into service and transported cargo, in November and December 1980, between Portland and Hawaii. Immediately after the barge was repaired, the barge went to a port in Portland to pick up cargo destined for Hawaii. While the barge was being loaded John Lanagan, cargo supervisor for HML in charge of loading the barge, did not see any lock wires on the cables and turnbuckles. (App. C, pgs. A-108--A-113).

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THIS COURT.

A. The Ninth Circuit's Decision Misinterpreted This Court's Holding in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed2d 1 (1981)

Both the District Court and the Ninth Circuit held that HML was not negligent and responsible for Plaintiff's injuries because it could not reasonably forsee that the cable would unscrew from the turnbuckle and that there would be no locking wire to prevent the turnbuckle from separating from the cable. This

misapprehends the facts. There is a conflict existing between the decision of the Supreme Court and the Ninth Circuit which merits resolution by the Supreme Court.

In Scindia, supra, Plaintiff De Los Santos was injured while he was working as a longshoreman aboard a vessel owned by the Defendant Scindia Steam Navigation Co. Plaintiff, while in the ship's hold, was struck by sacks that fell from a pallet which was held in suspension by a malfunctioning winch. The winch's braking mechanism had been malfunctioning for two days prior to the day of the accident. The district court granted summary judgment for the shipowner and the appeals court reversed. This Court, in affirming the appeals court, held that a vessel owner owed the following duties to a longshoreman: (1) Before the

stevedoring operations began, the shipowner had to see to it that the ship and its equipment were in such condition that a stevedore would be able to carry on the cargo operations with reasonable safety, and to at least warn the stevedore of any hidden defects in the equipment that were known to the shipowner or should have been known to him; and (2) After the cargo operations began, the vessel owner owed a duty to the longshoreman to act where danger to the longshoreman arose from a defect in the equipment if the owner: (a) had knowledge of the defect [owner chargeable with knowledge where equipment is defective from the outset]; (b) knew that the longshoreman would continue to work despite the existence of the defect; and (c) would not reasonably expect the longshoreman to remedy the situation. In

expressing its opinion on the vessel owner's duty before the cargo operations began, this Court said:

> "the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. 394 U.S., at 416, n. 18, 89 S.Ct., at 417. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a

longshoreman."

(101 S.Ct. at pgs. 1621, 1622)
(Emphasis added)

With regard to the shipowner's duty after the stevedoring operations began, this Court said:

> "we agree that there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations.
>
> On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance. The malfunctioning being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition or was charged with knowledge of it, it was nevertheless entitled to assume that Seattle, the specialist in loading and unloading, considered the equipment reasonably safe and was entitled to rely on that judgment.
>
> Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was

> continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of is condition.
>
> (101 S. Ct. at pg. 1626)
> (Emphasis added)

It is clear, therefrom, that a shipowner would be liable to an injured longshoreman if the injury was proximately caused by an equipment that was defective from the outset of the cargo operations. It is equally clear that a vessel owner would also be liable, after the cargo operations began, if he was aware of the defective equipment, knew that the longshoreman would continue to operate the defective equipment, and could not reasonably expect the longshoreman to correct the defect. And the vessel owner would be deemed to have

knowledge of the defective condition if it existed from the outset.

The decision of the Ninth Circuit, and that of the District Court, holding that HML could not reasonably foresee the unscrewing of the turnbuckle and the absence of the locking wire is contrary to the recognition by the Supreme Court that a vessel owner is responsible for any injuries caused by equipment that was defective from the start of the stevedoring operations.

It is the responsibility of the shipowner, where he supplies equipment to the stevedore, to inspect the equipment for safety before turning it over for use by the stevedore. Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355 (9th Cir. 1983). It is undisputed that HML was the owner of the barge and its equipment. As such, HML had the duty to see that the

proper equipment was supplied to the stevedore, including the winch to pick up the slack in the cable, and to inspect the equipment for safety. This was the responsibility of Marlin Pulliam, HML's operations manager, who usually inspected the barge's cables to see that the threads inside the barrel of the turnbuckle were secured to the cables. On the date of the accident, however, the cables were not inspected before the barge was turned over to the stevedore since Pulliam was on vacation. Also, the winch could not be found. An inspection would have revealed a defect in the equipment in that there was an absence of lock wires and the threads inside the barrel of the turnbuckles were at its end and ready to be separated from the cable. The inspection would also have discovered that the winch to pick up the

slack in the cable was missing. The Ninth Circuit's failure to acknowledge that turning over defective equipment to the stevedore for cargo operations is a breach of duty by the shipowner, is contrary to the Supreme Court's edict in Scindia, supra.

B. Knowledge of Defect Implied Where Defect Existed From Outset.

As indicated heretofore this Honorable Court has determined in Scindia that a shipowner may still be liable to the longshoreman after the cargo operations has begun where the vessel owner has knowledge of the defect, knows that the longshoreman would continue to work despite the defect and that the longshoreman could not be expected to correct the situation. The Ninth Circuit's holding that HML could not reasonably foresee that the manual

untangling of the cables would cause the turnbuckle and cable to separate, is in conflict with the decision of this Court in Scindia. The Ninth Circuit's decision is erroneous because where the defect in the equipment exists from the beginning, the vessel owner is deemed to have knowledge of the defective equipment. Here, HML failed to properly inspect and maintain the equipment to see that the lock wires, turnbuckles and cables were properly secured before they were turned over to the longshoreman. HML also failed in its duty to see that the winch to pick up the slack in the cables was available to the stevedore when the cargo operations began. Thus, HML is deemed to have knowledge of the equipment defect. HML also knew that the longshoreman would continue to work despite the defect because on two prior occasions when the

cables jammed HML's manager, Marlin Pulliam, untangled the cables and the longshoreman continued to work. And the defect in the equipment could not be expected to be remedied by the longshoreman because the absence of lock wires and the unthreading of the turnbuckle were not easily detectable by the longshoreman. The lock wires and the turnbuckle were on top of the barge doors, which were approximately 16 feet high, and were not visible to the longshoreman.

The effect of this decision reaches far beyond one isolated incident involving a longshoreman aboard a vessel. Effectively, the Ninth Circuit has ignored the decision of this Court which requires vessel owners to supply stevedores with equipment that is in proper working order. The decision of

the Ninth Circuit raises serious questions concerning future cases involving defective equipment supplied to stevedores at the outset of cargo operations.

II. FORESEEABILITY OF PRECISE INJURY NOT NECESSARY FOR LIABILITY.

The Ninth Circuit's decision in dismissing the claim against WISCO was contrary to the holding of this Court in Munsey v. Webb, 231 U.S. 150, 34 S.Ct. 44, 58 L.Ed 162 (1913). The decision of the Ninth Circuit, in dismissing the claim against WISCO, was based on the ground that WISCO could not have foreseen a workman climbing the barge door to untangle the cable and falling therefrom when the turnbuckle separated from the cable. It is not necessary that one charged with negligence must have

anticipated the precise injury sustained by the claimant - it is sufficient that the wrongdoer should have foreseen that the negligent conduct would result in injury to someone. As was stated by this Court in Munsey, "it was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." (231 U.S. at pg. 156). Similarly, in Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952) the Fourth Circuit, citing Munsey, stated:

> "...it is no defense to argue that defendant could not foresee the particular use to which the dynamite was put in this instance. As stated in 38 Am.Jur. 671: 'It is not a necessary element of negligence that one charged therewith should have been able to anticipate the precise injury sustained. To render one liable for negligence, it is sufficient that he should have foreseen that the negligence would

> probably result in injury of some kind to some person, and he need not have foreseen the particular consequence or injury that resulted.' See also, Munsey v. Webb, 231 U.S. 150, 34 S.Ct. 44, 58 L.Ed. 162;"
>
> (193 F.2d at pg. 550)

WISCO's act in not providing lock wires to secure the turnbuckle to the cables when it repaired the barge was sufficient to charge WISCO with negligence because it was foreseeable that such act would cause injury to someone. If was not necessary that WISCO foresee the precise injury sustained by the Plaintiff to hold it liable - a contrary decision would be in conflict with the holding of this Court in Munsey, supra.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: October 16, 1987

Respectfully submitted,

/s/ Henry N. Kitamura

WALTER S. KIRIMITSU
HENRY N. KITAMURA

SHIM, TAM, KIRIMITSU, KITAMURA
& CHANG
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
(808)524-5803

Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS

OF LAW AND ORDER FOR JUDGMENT

[Filed June 10, 1986]

This is an action for personal injuries arising under the Longshoremen's and Habor Workers' Compensation Act, 33 U.S.C. § 905(b). After trial to the Court, the case was taken under advisement. The statement of facts herein shall be deemed the Court's findings of fact and the discussion herein shall be deemed the Court's conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure. Judgment will be entered in favor of defendant.

STATEMENT OF FACTS

At all relevant times the defendant Hawaiian Marine Lines, Inc. ("HML") operated a fleet of barges carrying cargo between Hawaii and the mainland. Its cargos were loaded and unloaded in Hawaii by Castle & Cook Terminals ("Castle"), a

stevedore company, pursuant to a written contract which, among other things, required Castle to "perform one (1) opening and closing of the vessel's cargo house doors." The plaintiff Donald L. Kong was employed by Castle as a supervisor. He supervised a crew of longshoremen during the loading or unloading of vessels.

The barge OAHU was one of HML's barges. Access to its cargo house was through two doors mounted on a track so that they were opened by sliding them apart and closed by sliding them together. The doors were opened and closed by a cable system consisting of three one-half inch galvanized steel cables, two winches, three pulleys, two gussets and two turnbuckles. To one facing the doors, the winches were mounted about three feet up on a

stanchion to the left of the doors. Two pulleys were mounted to the left of the doors and above the winches. The third pulley was mounted on a stanchion above and to the right of the doors. A gusset was attached to the top of each door a few feet from the center of the entrance to the cargo house. A turnbuckle was attached to the right side of each gusset.

A turnbuckle consists of a barrel into which are inserted two pins. One pin has left-handed threads and the other right-handed threads. There is a clevis at the end of each pin. One end of the follower cable was attached to the port turnbuckle, and the other end was attached to the starboard turnbuckle. A locking wire was inserted through a hole at the end of each pin and wrapped around the barrel to prevent the barrel from turning.

One of the winches was used to open the doors by winding a cable attached to the port gusset. The other winch was used to close the doors by winding a cable attached to the starboard gusset. Opening the starboard door and closing the port door were effected by a follower cable. As the port door opened, the follower cable would simultaneously pull the starboard door open. As the starboard door closed, the follower cable would simultaneously pull the port door shut.

The function of the turnbuckles was to keep the follower cable under tension so that both doors would simultaneously open or close to the same extent. If the pin holding an end of the follower cable were to unscrew, the resulting slack in the cable would prevent the starboard door from completely opening, and the

port door from completely closing. Turnbuckles are also used to keep tight lashings of cargo. These are necessarily adjusted every time cargo is lashed down. However, turnbuckles for opening and closing cargo house doors are not inspected on a routine basis. A failure of the doors to come together on closing will signal a need for adjustment of the turnbuckles to obtain the proper tension.

Both of the winches were operated manually. One hand wheel was provided for turning the two winches. Opening and closing the doors were long, laborious operations.

At some time in the past, a practice had developed of using a forklift to push the doors shut or pull them open. This practice was followed in both Honolulu and Portland. By using a forklift, opening and closing the doors of the

cargo house could be done more quickly and less laboriously than by using the winches. It was necessary to have someone wind the appropriate winch to take up the slack in the appropriate cable whenever a forklift was being used to open or close the doors. When using the forklift, the port door was required to be pushed open first and the starboard door was required to be pulled closed first, otherwise slack in the follower cable could not be taken up by the winches.

So long as a forklift opened and closed the cargo house doors in the proper order and the winches took up any slack in the cables, there was no unreasonable risk of injury.

On two occasions before December 24, 1980, while a forklift was being used to open or close the cargo doors, the cables

became entangled. On each occasion Martin Pulliam, HML's operations manager, climbed the batten boards to untangle the cables.

In October of 1980, the barge OAHU was sent to Willamette Iron and Steel Company ("WISCO") in Portland, Oregon, for repair and overhauling. The work included the installation of new opening and closing cables. Replacement of the follower cable was not required. After installing the new cable, WISCO adjusted both turnbuckles to establish the proper tension on the follower cables, lubricated them and wrapped them in canvas to minimize corrosion.

After WISCO completed its work on the barge OAHU, it transported cargo from Portland to Honolulu, from Honolulu to Portland and from Portland to Honolulu, arriving on December 22, 1980. On

December 23, Castle longshoremen commenced loading barge OAHU with cargo destined for Portland.

During the night of December 23, 1980, Mr. Kong's crew completed the loading of another HML barge. They were then instructed to assist another crew in loading the barge OAHU. Loading of the barge OAHU was completed after midnight. The wheel to turn the winch to close the doors could not be located. A cable was attached to the port door of the barge's cargo house and to the forklift, and the port door was pulled shut causing the follower cable to slacken. Slack also developed in the port door's cable because it could not be picked up by turning the closing winch. The cable was then attached to the starboard door to pull it shut. Before the door could be completely shut, slack in at least one of

the cables caused it to become entangled with one or both of the other cables so that the starboard door would not close completely.

A longshoreman named Furtado climbed the batten boards on the port door to attempt to untangle the cables. He was unsuccessful and Mr. Kong climbed the batten boards on the starboard door to attempt to assist him. Mr. Kong seized the upper part of the follower cable by one hand and the lower part by the other. He tried to untangle the cables by a whipping motion. While he was doing so the follower cable came loose from the starboard turnbuckle causing him to lose his balance and fall on the forklift. As a result, Mr. Kong was seriously painfully and permanently injured.

During the course of the stevedoring operations on the night of December 23

and the early morning of December 24, the HML representative, Frank Yuen, was on the barge OAHU. When the door cables became entangled, none of the Castle personnel attempted to report it to Mr. Yuen or to any other HML person. Mr. Yuen became aware that there was a problem when he saw Mr. Kong fall.

Investigation revealed that the bolt holding the end of the follower cable at the starboard turnbuckle had unscrewed and separated from the turnbuckle. Separation occurred because there was no locking wire through the hole at the end of the pin and lashed to the barrel. While the follower cable was under tension, some unscrewing of the turnbuckle bolt could have been caused by vibration. The lubrication of the turnbuckle at Portland in November of 1980 would have caused the pins to be

more easily unscrewed. The torque resulting from Mr. Kong's attempting to untangle the cables by a whipping motion could have hastened the unscrewing.

No turnbuckle pin had ever before separated from a turnbuckle on a HML barge's cargo house door.

The Kongs sued HML alleging that Mr. Kong's injuries were proximately caused by the negligence of HML. After HML filed a third party complaint against WISCO, the Kongs joined WISCO as an additional party defendant. At the close of plaintiffs' case the Court granted a motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss WISCO as a party defendant, but denied a motion to dismiss it as a third party defendant. Subsequently, the Court was informed that HML and WISCO had resolved the third party issues.

DISCUSSION

Prior to 1972, a longshoreman injured while loading or unloading a ship could receive compensation payments pursuant to the provisions of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. He could also have judgment against the ship owner if the injury was caused by the ship's unseaworthiness or negligence. The Act was amended extensively in 1972. The longshoreman's right to recover for unseaworthiness was abolished. However, his right to recover from the ship owner for negligence was preserved by Section 905(b) of the amended Act. See Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 164-65, 101 S. Ct. 1614, 1620-21 (1981).

In Scindia the Supreme Court described the duties owed by a vessel to

a stevedore and his longshoremen employees:

1. To exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property," 451 U.S. at 167, 101 S.Ct. at 1622;

2. "To [warn] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations, and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the

performance of his work." Id.

3. To exercise reasonable care to avoid injuring a longshoreman when a vessel actively involves itself if cargo operations. Id.

4. "To exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operations." Id.

A vessel's duty to the longshoremen does not require the ship owner to exercise reasonable care to discover dangerous conditions that develop within the stevedoring operations. Scindia, 451 U.S. at 172, 101 S.Ct. at 1624. However, if a ship owner knows that a stevedoring operation is being conducted in a manner that creates an unreasonable risk of harm to the longshoremen, the ship owner has a

duty to intervene. Id. at 175-76, 101 S.Ct. at 1626.

Applying the principles enunciated in Scindia to the facts in this case, the following conclusions can be drawn:

1. The barge OAHU was in such condition that the stevedore could have carried out its cargo operation with reasonable safety to its longshoremen.

2. HML did not know and in the exercise of reasonable care would not have known that the pin holding the end of the follower cable at the starboard turnbuckle had unscrewed and that there was no locking pin to prevent the bolt from separating from the turnbuckle.

3. HML did not know nor in the exercise of reasonable care should have known that the longshoremen would attempt to close the barge OAHU's cargo doors by (a) first pulling the port door shut and

(b) attempting to shut the doors with a forklift when the wheel to turn the closing winch could not be found.

4. HML (acting through Mr. Yuen) did not know the manner in which the stevedore was attempting to close the barge OAHU's cargo doors on December 24, 1980.

5. HML (acting through Mr. Yuen) did not know of the entanglement of the cables and of Mr. Kong's presence on the batten boards for the purpose of trying to entangle them until it was too late to intervene.

6. HML was not negligent.

ORDER

IT IS ORDERED that plaintiffs take nothing by their complaint and that judgment be entered in favor of the defendant Hawaiian Marine Lines, Inc.

DATED this 10th day of June, 1986.

/s/Charles L Hardy
CHARLES L. HARDY
Judge of the United
States District Court

cc: all counsel of record

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-2301

D.C. CV 82-0176-CLH

DONALD L. KONG; MAY S. KONG,

Plaintiffs-Appellants,

v.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation;

WILLAMETTE IRON AND STEEL COMPANY;

GUY F. ATKINSON COMPANY,

Defendants-Appellee.

MEMORANDUM *

[Filed July 23, 1987]

Before: GOODWIN, TANG and THOMPSON,

Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

An injured longshoreman and his wife sued Hawaiian Marine as owner of the vessel upon which the industrial accident occurred, and Willamette Iron and Steel Company, as a firm that had repaired the vessel. The trial court found no third-party liability and dismissed the action against both defendants. The plaintiffs appeal, and we affirm.

Kong was injured when he fell from the top of a barge door and bounced off a forklift before hitting the steel deck. Kong had climbed up to the top of the door to untangle slack in wire rope that had accumulated as the doors were being pushed open by a forklift instead of being opened by a hand-turned windlass which was designed to pull the door open by means of winding in and paying out the wire rope.

The trial court determined that the

accident resulted from a sequence of events entirely within the control of the stevedore company, and essentially beyond the control of either the owner of the vessel or the repair firm which had recently replaced the cables in the door-opening mechanism. It was the plaintiffs' theory that the vessel was liable for the failure to provide a safe ship (one on which a cable would not give way while a workman was relying upon its remaining fast) and that the repairman was liable for placing in service a cable and turnbuckle that would be likely to work loose from its moorings while workmen were hanging onto it.

The trial court rejected these theories of legal duty owed by the vessel or its repairman to the workman. The court found as a fact that the shipowner was not negligent in failing to discover

that the turnbuckle that came loose had not been adequately secured. The court found that the repairman had done the work specified by the owner and that the owner had accepted the work. The court then apparently followed the largely discredited "accepted work" doctrine, which, at early common law, protected from third-party liability a contractor whose work had been accepted by an owner if the property or appliance under control of the owner turned out to be unsafe for workers or others using the property or appliance.

The district judge's reliance on the "accepted work" doctrine was in error. This doctrine was in good standing at the time of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), but has since been discredited. Modern industrial accident cases uniformly

either reject or severely limit the applicability of the "accepted work" doctrine. 58 A.L.R. 2d 865, 873 (1958) (discussing contractor liability to third persons). More important, for we apply substantive admiralty law in this case, the Fourth Circuit has specifically rejected the "accepted work" doctrine under general maritime law. Whorton v. T. A. Loving & Co., 344 F.2d 739 (4th Cir. 1965).

Notwithstanding the error in adopting the so-called "accepted work" doctrine, the trial court correctly dismissed the claim against the repairman. There is no evidence in the record that would justify a finding that any reasonable repairman would have foreseen that workmen would place themselves in a position to be injured if the turnbuckle should work loose from the "following" cable

installed to help pull the barge door open. The only foreseeable and untoward consequence of the turnbuckle coming loose in the proper operation of the winches would be that the door would not open, if closed, or close, if opened. Because the method chosen by the longshoremen to open the door consisted in pushing with a lift truck rather than pulling with the hand-operated winches (except to take up slack) there was no foreseeable connection between the repairman's alleged installation of the defective turnbuckle and the injury that befell this workman. More to the point, there was no reason for the repairman to foresee that any workman would climb up the door and use the cable for a handhold while shaking out slack caused by opening the door with a lift truck. Accordingly, we hold that there was no error in

releasing Willamette Iron and Steel Company from liability, even though the court articulated the wrong reason for doing so.

The appellants' theory of the shipowner's liability is based on the owner's duty to provide to a stevedore crew a ship that is reasonably safe for the intended stowage or discharge of cargo and free from hidden defects likely to cause injury to the longshoremen. The vessel turned out to have a hidden defect which did in fact produce an injury. Nonetheless, the district court ruled that the shipowner was free from fault.

The vessel's bargehouse doors were designed to be opened and closed by means of winch mechanisms. One winch was designed to open the doors by winding the "open cable" attached to the port gusset so as to pull the port door to the

portside and simultaneosly pull on the follower cable thereby forcing the starboard door to slide open to the starboard side. The other winch was designed to close the doors by winding the "close cable" attached to the starboard gusset theréby sliding the starboard door to the portside. This action created a tension on the open cable so that the port door would close to the starboard.

Several years prior to the accident, the vessel's owner became aware that longshoremen were opening the barge doors by means of forklifts. This process made the opening of the doors quicker and easier than the hand-cranked winch method. The forklift method, however, also made it necessary for the stevedore's employees to man the winches in order to take up the slack that

developed in the cables. When using the forklift method, it was essential that the port door be pushed open first and the starboard door be pushed closed first. In any other sequence, slack in the form of a loop would develop in the follower cable, and this slack could not be taken up by the winches. In such event, frequently the cables would jam and the doors could not be fully closed. On two occasions prior to the accident involving the vessel, longshoremen failed to take up the slack with the winches and the cables became entangled. Both times, a longshoreman was able to untangle the cables without injury or risk to anyone.

On the day of the accident, after the barge was fully loaded, the longshoremen began to push the barge doors closed with the forklift. The longshoremen could not locate the detachable wheel used to turn

the winch. They nonetheless began their operation by using the forklift on the port door. Slack developed in the port door's cable. Because the wheel for the winch had not been located, the slack was not taken up. The cables then became entangled and the doors would not close completely.

After one longshoreman had climbed to a point on the port door to attempt to untangle the cables and was unsuccessful, Kong climbed up the starboard door to assist in the untangling. Kong attempted to untangle the cables by whipping them with one hand while holding onto the follower cable with the other hand to brace himself. The cable came loose from the starboard turnbuckle causing him to lose his balance and fall.

Although the vessel's representative, Frank Yuen, was on the barge at this

time, none of the stevedore personnel reported the problems with the barge doors to Yuen or any other officer of the vessel. Yuen became aware of the situation only after he heard some commotion and saw Kong attempt to untangle the cables and then fall.

After the accident, an investigation revealed that the bolt holding the end of the follower cable to the starboard turnbuckle had unscrewed and separated from the turnbuckle. One cause for this separation was that there was no locking wire attaching the cable to the turnbuckle. The separation was apparently hastened both by normal vibration aboard the barge and as a result of the whipping motion Kong used in attempting to untangle the cables.

The primary responsibility for maintaining safe conditions on board a

vessel during cargo operations rests on the stevedore. Taylor v. Moram Agencies, 739 F.2d 1384, 1387 (9th Cir. 1984). A shipowner may also incur liability toward longshoremen employed by stevedores but only in circumstances where the shipowner has breached a duty to intervene or warn of a hazard. Such a duty may arise when the owner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation. Id. at 1388, citing Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156, 175-76 (1981).

Appellants argue that by failing to discover or warn of the defect in the turnbuckle, the owner breached his duty

of care to longshoremen engaged in cargo operations aboard his vessel. To prevail on this theory, however, appellants must prove that three eventualities were foreseeable: (1) that the defect would not have been discovered and safely dealt with by the stevedore, (2) that the defect would have foreseeably resulted in injury arising out of the cargo operations, and (3) that the defect would have caused the type of injury suffered.

Appellants rely on Subingsubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982), and Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967 (1982). In both cases, as in this case, a longshoreman was injured as a result of a hidden or nonobvious defect or condition. However, unlike this case, Subingsubing and Turner involve

conditions that reasonably and foreseeably could cause injury, and that would likely be encountered by the stevedore in the normal course of cargo operations.

In Subingsubing, a longshoreman died as a result of injuries sustained when he stepped on a "dead-eye," a small piece of wood used to stop the step of a rope ladder from moving. The court held that the duty of care enunciated in Scindia included "reasonable care to keep the deck clear of dangerous and nonobvious tripping hazards at the time that the longshoreworker comes on board." Subingsubing, 682 F.2d at 782. The conclusion that the piece of wood on the deck presented a "nonobvious tripping hazard" contains an implicit assumption that it was "reasonably foreseeable" or "likely" that someone could be injured by

tripping over a piece of wood lying on the deck.

In Turner, a longshoreman was injured when he was unloading plywood from the hold of the ship and a stack of plywood collapsed beneath him. The testimony revealed that the shoring had not been constructed properly and that a properly shored stack of plywood should not have collapsed under the weight of a longshoreman. The cargo had been loaded by a Japanese stevedore, and shored and lashed by another Japanese firm. The court held that "the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." Turner, 651 F.2d at 1304. As in Subingsubing, it would be difficult to conclude that the improper shoring was

a "concealed danger" unless the court implicitly assumed that injury to a longshoreman was likely to occur or at least could be reasonably foreseen as a result of the defect in the shoring.

Appellants argue that the owner knew before the accident that opening and closing the barge doors with a forklift would create a hazardous condition. This contention is not established by the record. The district court found that "so long as a forklift opened and closed the cargo house doors in the proper order and the winches took up any slack in the cables, there was no unreasonable risk of injury." On this occasion, of course, a winch was not used to take up cable slack because the winch wheel was misplaced or lost. There is no record evidence, however, that the vessel owner was in any way responsible for not having the winch

wheel where the longshoremen could find it. In addition, the mere fact that on two prior occasions someone had found it necessary to climb the barge doors to untangle fouled cables is not a sufficient ground to hold the owner responsible for knowledge that the turnbuckle mechanism attached to the starboard follower cable was in a dangerous condition. The important fact is that from the perspective of the vessel owner, the stevedore's use of the forklift and winch method to open and close the cargo doors in the normal course of operations had proved to be safe and efficient.

Before the accident there were no known incidents where a bolt had ever disengaged from a turnbuckle on cables above the barge door. It would have been reasonable to expect that even if a bolt

holding an end of a follower cable were to unscrew from its turnbuckle, the cable would merely lose tension and lay on the door mechnisms without posing any risk to workmen. While unwanted slack in the cables could be expected to have prevented the doors from functioning completely, the owner of the vessel would have no reason to anticipate that a longshoreman would climb up the door, much less that he would attempt to hold onto the slackened cable for support.

In summary, the vessel's duty to warn arises only with respect to hazards that would be likely to be encountered by the stevedore in the course of normal cargo operations. In this case, it was not reasonably foreseeable that manually untangling the cables would cause the follower cable to disengage from the turnbuckle or that the separation of the

cable from the turnbuckle could cause injury of the kind appellant suffered here. Therefore, we have no basis for holding clearly erroneous the district court's factual determination that the owner was not negligent. The stevedore's negligence, of course, is not before us.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF VII VOLUMES

PAGES 1-156

DATE: May 22, 1986

Hawaiian Marine Line barges.

A Yes.

Q Now, on the other barges, what kind of winch system did they have to open and close the doors?

A They were open barges, strictly container barges, so there were no winches. The only two barges that had winches were the house barges, barge Oahu and the Malolo.

Q Malolo

A Yes

Q So the Malolo also had a cargo house, a deck house, and it had doors, right?

A Yes, similar to the Oahu.

Q And how did the winch system on the Malolo work?

A They were the same. Both barges manually opened.

Q Did any of them have an electric

winch system?

A None as far as I know.

Q Now, Mr. Tanaka, before Mr. Kong's accident, did you open and close the barge doors, or did you and your men open and close he barge doors on the Oahu before Mr. Kong's accident?

A Yes.

Q And could you tell us first how you used to open, well, let's say close the doors? How did you used to close the doors on the barge Oahu? Can you speak into that microphone?

A We were taught by Don Stiger and Marlin of HML. Actually, the opening and closing of the barges Malolo and Oahu was

their responsibility, and, as the years went by, they taught the longshoremen as well as the supervisors in charge of the

operation how to open and close the barges. To make it easier for the men, what they were doing was using a forklift on the deck to push and open the doors. That would save a lot of time. If we were to manually open the door here, it would take approximately, what you call, twenty-five to half an hour just to open the door or close the door. By using a forklift to pull the door open and push the door closed, while you're opening the door you pull it, and all the men do is take the slack on the cable. By doing this, you can open and close the door in approximately five minutes or less at times, you know, if we don't have any problems with the cables.

Q So you save approximately 15 to 20 minutes each way by using the forklift?

A Yes, sir, we did.

Q Now, you said you were taught by Don

Stiger and Marlin. Number one, who is Don Stiger?

A. Don Stiger, I would say at that time he was the operating manager, and Marlin was his assistant, you know.

Q Were they both from Hawaiian Marine Lines?

A Both of them, Hawaiian Marine Lines.

Q About how long before Mr. Kong's accident were you taught to do this?

A About two years.

Q These brackets that go up the door?

A Yes, those brackets there.

Q And did you have any men manning the winch to pick up any slack on the cable wire?

A Yes. George Chock had two men on the wince there, and then Joe Flores... .

THE COURT: Just a minute. Who had

the men on the winch?

THE WITNESS: George Chock is the gang foreman. He's in operations.

Q Mr. Tanaka, that night--I don't want to contradict you--but in your deposition did you not state that the wheel was absent or gone or nobody could man the winch?

A Oh, yes. When we tried to close it, George Chock being the foreman and Wesley Furtado--he mans the winches, you know, opening and closing up the winches--looked around for the wheel approximately two feet in diameter, and then he approached Kong and said, hey, they cannot find the wheel.

Q That's the detachable wheel.

A The wheel to close the doors.

Q Now, did they check to see if the wheel was in the bracket that you said which was the usual position of the wheel?

A Yes. That's the first place they looked, and they looked other places, and they couldn't find it at that time. Then

Donald Kong approached me, and I looked for myself and finally we found it on the barge but far away from where it should have been.

Q And this was after the accident already.

A Yes, after the accident.

Q Could you proceed and tell us, as you tried to close the doors with the forklift, what happened?

A When we tried to close the doors with the forklift, what happened was the cable on the top somehow got tangled, and Donald Kong, the operating supervisor at that time, was standing next to me and Wesley Furtado, George Chock, and the

forklift operator, what you call, Joe Flores at that time, operating Hyster 464; and, when the thing got tangled, Wesley Furtado climbed up on the right side of the door, I mean on the left side of the door to see what the problem was.

Q When you say the left side of the door, was that on the port door?

A When you're facing the door, looking at it from here, that's the port there, yes, on the left.

Q So Mr. Furtado went up on the port door to check to see what was wrong.

A Yes, he did.

Q And what about Mr. Kong?

A Then since Wesley, what you call, had problem up there trying to untangle that cable, Donald Kong, he climbed up also

THE COURT: Just a minute. I'll

sustain the objection.

MR. KIRIMITSU: Would you resume your seat again, Mr. Tanaka?

(Witness resumed the witness stand)

Q In your experience as a superintendent, Mr. Tanaka, have you come across what is called a locking or jam nut?

A All the turnbuckles that are used on these HML barges for lashing and unlashing have locking nuts on them.

Q Looking at this exemplar, is there any jam nut on it?

A On this particular turnbuckle, no, there is no jam nut on it.

Q Normally from your experience where would the jam nut be?

A The jam nut would be right on here. What it does is prevent this thing from unwinding by itself. After it takes so much tension on it, you'll tighten on

this jam nut, and that would prevent this from working itself loose. To further, what you call, prevent this from spinning, most of the turnbuckles have a hole that goes right through the turnbuckle, which we use a baling wire. That's a second thing to prevent this, what you call, nut here to spin also. By having the lock nut and the wire here, that would prevent the nut from spinning.

Q And what is that wire device called?

for a HML representative?

A George Chock told me he looked for one of the representatives at that time. Later on, as I recall, Donald Kong also did.

Q Were you able to find a representative of HML?

A When Donald approached me, he said

did you see any representative from HML, and I told him no; so, in turn, I also looked for myself.

Q Going to the detachable wheel that was usually or should have been on the bracket, you indicated that eventually you found the wheel, is that correct?

A Yes, we did.

Q About when did you find the wheel?

A After the door jammed.

Q And where did you find the wheel?

A It was hidden in between on of those brackets there.

Q Close to where it should have been, or whereabouts in relation to that door?

A It was on the starboard side.

Q On the opposite side.

A On the opposite side, yes.

Q You mentioned that it was hidden. How was it hidden? Why was it hidden?

A Somehow the barge has a strong

upright frame that holds the cargo from shifting, and that thing has an opening and

at times they would store some chain and loosened turnbuckles in there. It acts as a storage compartment, and somehow somebody stuck the wheel in the storage area there, which we didn't realize it was in there.

Q And that's not the usual place to store it.

A That's no place to put it because no one would expect it to be hidden in there.

A Mr. Tanaka, based upon your experience as stevedoring superintendent, when the doors like the barge doors got stuck that night and there are no HML personnel at the pier, what is your job? What do you do in that

situation?

A We try to give our customer the best service we can. We try to eliminate any standby time. If there is no HML representative at the time to assist us or instruct us how to open and close the door, we've been doing it for so long with the representative, and at times when they are not around we automatically close the door, because we don't want to be criticized just standing around there and waiting for a person to come around just to close the door. So we do it by ourselves and we were taught how to open and close the door.

Q About what time did Mr. Kong's accident happen?

A It has been two years. I don't recall. It was after lunch sometime.

Q Could it have been after midnight?

A When I say after lunch, it's after

midnight, because we

MR. NAGLE: Objection; immaterial.

THE COURT: Sustained.

MR. ESTES: No further questions.

MR. KIRIMITSU: No further questions, your Honor.

THE COURT: Mr. Tanaka, I want to ask you some questions.

THE WITNESS: Yes, your Honor.

THE COURT: Did anyone of Hawaiian Marine Lines tell you we want to use the forklift to open these doors to save some time?

THE WITNESS: Yes, not to save time but it would be much easier, they told us, to use the forklift, because prior to that... .

THE COURT: Just a minute now. Do you recall who told you to do that?

THE WITNESS: Marlin.

THE COURT: That's Mr. Pulliam.

THE WITNESS: Pulliam, yes.

THE COURT: Anyone else?

THE WITNESS: Prior to Marlin, it was John Stiger.

THE COURT: John Stiger?

THE WITNESS: Yes, John Stiger.

THE COURT: He was before Mr. Pulliam.

THE WITNESS: Yes.

THE COURT: Do you recall about when he told you

to use the forklift?

THE WITNESS: No, I don't recall.

THE COURT: Do you recall when Mr. Pulliam did?

THE WITNESS: It was prior to Donald's accident because we were reluctant about using a forklift because

of damaging the door, you know, by pushing, but I guess not because they told us to use the forklift. They requested for a forklift to push and open the doors, so from then on we started using the forklift.

THE COURT: When do longshoremen use the safety belts? Under what circumstances?

THE WITNESS: Mostly container operations, you Honor.

THE COURT: What do they hitch the belt to?

THE WITNESS: Most of the containers, like the Matson containers, they have safety rings, built-in safety rings, so we can hook the belts on.

THE COURT: To your knowledge, are forklifts used to open barges by any other shipowner than Hawaiian Marine?

THE WITNESS: Just HML, as I recall.

THE COURT: HML?

THE WITNESS: Hawaiian Marine Lines.

THE COURT: Just Hawaiian Marine Lines.

THE WITNESS: Yes, your Honor.

THE COURT: Anything else, Mr. Kirimitsu?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME II OF VII VOLUMES

PAGES 157-306

DATE: May 23, 1986

A Operations manager.

Q And this would be operations manager for Hawaiian Marine Lines.

A Yes.

Q Can you tell us what were your duties as operations manager for Hawaiian Marine Lines in Honolulu?

A To hire a stevedore company to arrange for the delivery and receiving of cargo, husbandry for the tug as far as allocating fuel, groceries, making up stow plans for the barges, running down claims, terminal operations.

Q Did you have any duties relating to the bolts on the doors of the barges that would come into Honolulu?

A When the barges would come in, I would undog the bolts on the doors.

Q What do you mean by undog the bolts?

A Loosen them and take the bolts off.

Q And as operations manager was it also your responsibility to inspect the equipment on the barges?

A I would take a visual inspection.

Q I'm sorry. I couldn't hear you.

A A visual inspection of everything on the barge.

Q All right. Allow me to refer you to the date of the accident in this case with Mr. Kong which is December 24, 1980. Were you the operations manager for Hawaiian Marine Lines at that time?

center and you turn on the wheel and the door would open. When you close, you would put it on there, the wheel would close it if you turn it.

Q All right. You can resume your seat.

(Witness resumed the witness stand)

Q Now, on the particular system on the

barge Oahu with such things as the cable, the turnbuckle, the eye bolts, the gusset, the winches and the bolts, who performed the regular maintenance of those items?

A That was performed in Vancouver by Columbia Marine Lines.

Q And these would be some of the items that you would inspect when the barge would be in port in Honolulu.

A Yes. I visually inspected, yes.

A What are the batten boards on the door?

A The batten boards are the eight boards that's running horizontally on the face of the door.

Q And what were these boards used for?

A They are used to protect the door from the cargo that was loaded on the after deck.

Q Now, I'd like to get back to the area

of inspection. Can you tell us what you do as far as inspection from the time the barge would come into port to the time the barge left?

A I get on an assist tug at pier 21 and go out to the barge, and I pull n retrieving line, go down to the engine room

start the engine, and on the way in turn on all the lights on the barge, and on the way up forward I would go up one side and check the running lights and make sure they were functioning, open all the vents making sure that the vents were open, go up forward and start up the casting engine, and at that time the tug will be breaking its tow and I pull up the bridle chain and the pig tail.

Q Okay. Mr. Pulliam, I'm asking you as

far as inspection itself.

A Okay. I'm inspecting all this.

Q Okay.

A I'm inspecting the hard shackles and the insurance wire, and then I go down the other side and check the running lights and the vents, and then I usually go and undog the bolts on the door, go through the hatch and check the cargo and also the lashing on the cargo.

Q And as a matter of procedure, how often would inspections be made? Would it be on every voyage every time a barge came in?

A Yes.

Q Okay. Now, if you were on vacation and someone else was taking your place, was the procedure for whoever was in your position to do the inspection?

MR. JIM ON: Objection, your Honor. That's speculation.

THE COURT: He may answer it.

A I don't know.

Q Was there any procedure at Hawaiian Marine Lines that the barge was to be inspected each time it was to come in?

A No, not that I know of.

Q This is something that you did yourself.

A Yes.

Q And as far as the specific cables, turnbuckles and eye bolts, you would do this on every voyage.

A I would visually inspect it from the deck to see if they were still in place.

Q And that's every voyage

A Yes.

Q And during the period of time when the barge would be loading and unloading in Honolulu, would you also be inspecting those items at that time also during that

period of time?

A Once I inspected it on the first, I wouldn't have to.

Q When the doors were opening and closing, you were usually there.

A Yes.

Q And you would take a look and see how the cable system was working and see if everything was properly adjusted.

A Yes.

Q Before Donald Kong's accident, do you recall when the last time the Oahu was in Honolulu?

A The last time? Probably about 35 days prior to the accident.

Q And you would have made your inspection at that time.

A Yes.

Q Were you present when the Oahu came

in during the period of time of the accident?

A No.

Q Where were you at that time?

A I was in Portland, Oregon.

Q Now, you previously stated that at times the doors would jam. Can you come down to exhibit number 1 and show the Judge where the jams would usually take place?

A This cable here was either jammed underneath here or this one here would be jammed underneath here. There's a type of roller on the back side of this.

Q You're pointing to the port and starboard gussets, right?

A Right.

Q And would the jamming take place when a forklift was used to open and close the doors?

A Yes. When the forklift is opening

it, if no one is manning on the opening, if no one is manning this winch, the cable would slack and you would get this to come up and jam.

Q Where did the cable slack a couple of times when you saw it jammed?

A Right up in here on top of here and underneath here.

HML as operations manager, was that practice already taking place at that time?

A Yes.

Q And the times that you observed the forklift being used to open and close the doors, you had no objection to their using this particular method, is that right?

A No.

Q In fact, would you say that was the

preferred method?

MR. JIM ON: Objection, your Honor. I think that requires the witness to give an opinion. I think it's an improper question.

THE COURT: He can answer that.

A Can you repeat the question?

Q Yes. Was that the preferred method of opening and closing the doors as opposed to doing it manually?

A It was the... .

MR. JIM ON: Same objection, your Honor.

THE COURT: Overruled.

MR. JIM ON: The question is not clear as to whom it is referred.

THE COURT: You may answer.

A It was easier to do it that way.

Q And you had no objections to the people using that particular method.

A No.

Q In fact, wouldn't you say in your opinion it was a more practical way to do it?

A Yes.

Q Okay. It would save time.

A Yes.

Q And it would save manpower.

THE COURT: You're leading the witness now.

MR. NAGLE: Thank you, your Honor.

Q Would it save manpower?

A Yes.

Q During the majority of time you were the operations manager at Hawaiian Marine Lines, were the doors closed and opened by means of a forklift or by means of the manual winch?

A By forklift.

Q Now, you stated before that there were times when you would undog the

bolts. Would you tell us how you went about doing that?

A With an inch and an eighth wrench.

Q And some of the bolts were located at the top of the door of the Oahu, is that right?

MR. JIM ON: I would object to the leading questions.

THE COURT: Sustained.

Q Where were the bolts located on the door of the Oahu?

A Would you like me to step down here?

Q Sure.

A Usually one of the longshoremen.

Q When you say one of the longshoremen, you mean someone like Tanaka?

A I can't recall if he got it, but it's usually one of the longshoremen working there.

Q Now, with respect to opening the barge door, did you need that winch wheel to open that barge door?

A Come again, please.

Q To open the barge doors, after it is undogged, did you not need this winch wheel?

A Yes.

Q You needed the winch wheel because of what? Slack?

A To take up the slack.

Q If the winch wheel was not used to open the barge doors, and there was slack, what would happen?

A It would jam up.

Q If the winch wheel was not used and the wires were slack, would it also create problems for the forklift coming into and unloading the cargo?

A Yes, but the doors would be open and the wire would be hanging slack in the

middle of the doorway there and it would catch on to that, and they would have to move the wire and hang it out someplace and get it out of the way.

Q But what would happen? Usually they would need the winch wheel to take up the slack anyway, right?

A That's correct.

Q Now, there has been some testimony, if I may move on to another subject matter, about your inspection of the turnbuckles and the cable system. Specifically with respect to this door, you mentioned the word visual. I mean did you go on top of the barge house doors every time it came in and did you inspect it real close? Is that what you meant?

A No. I didn't climb up there to

inspect it. I took a visual inspection from the deck itself.

Q Standing more than 15 feet away from it?

A Sixteen feet high and about eight feet back.

Q But you would generally look to see if it was attached, that it was not for any reason unsecured, is that right?

A That's correct. As long as it was working, it was fine.

Q Did you have any reason during the time you were there working for Hawaiian Marine Lines have any reason to inspect or to touch any of the turnbuckles on the door of the Oahu for any reason?

A No, I did not.

MR. ESTES: Objection. That's a compound question, if he had an opportunity to inspect or touch.

MR. JIM ON: Okay. I'll use inspect.

MR. ESTES: That has been asked and answered.

THE COURT: No. He may answer.

Q Please answer the question.

Q Okay. The only times though that you recall that the doors jammed were when the forklift was being used, is that right?

A That's correct.

Q You talked about occasions when you would make visual inspections of the cables and turnbuckles on the door of the barge Oahu when it came into port here in Honolulu. Do you recall talking about that?

A Yes.

Q And in order to do that, it is my understanding that you would stand on the dock and look up at those cables and

turnbuckles on the top of the door, is that right?

A I would stand on the deck.

Q I'm sorry. The deck.

A Yes.

Q Okay. Now, I take it you could see the turnbuckles and cables from the deck.

A Yes.

Q Okay. When you were inspecting those turnbuckles and cables, what were you looking for?

A To make sure the threads were inside the open area.

THE COURT: The threads?

THE WITNESS: The threads, yes.

Q When you say the threads are inside the open area, when I look at the turnbuckle, I look at the barrel of the turn.

buckle, which is that open area. Let's refer to that as the barrel, and there are two bolts that come in to either end of the barrel, is that right?

A Yes.

Q Now, when you say you're checking the threads on the inside, are you saying that you're checking to make sure that the bolts are threaded into the turnbuckle so that you can see them on the inside of the barrel of the turnbuckle?

A That's correct.

Q Now, did you ever have occasion when you checked, when you visually inspected the turnbuckles on the top of the door of the barge Oahu, when you noticed that the bolts were not threaded such that you could see the bolt on the inside of the barrel of the turnbuckle?

A Could you rephrase that?

Q Sure. When you inspected the turnbuckles--let's limit it to the turnbuckles--was there ever an occasion when you were not satisfied that the turnbuckle was properly attached?

A No, there was not an occasion.

Q Okay. What was the purpose for your inspecting the turnbuckles and cables?

A What was my purpose?

Q Yes. Why were you doing that?

A I'm just visually inspecting to make sure. Actually the doors, when the doors were working properly, there was

no need to really inspect it thoroughly.

Q When you say thoroughly, what do you mean by that?

A I did not only inspect vessels. This is just a minute part of it. I looked at

the cables to see if it was frayed, so...

Q Would you check the rollers to make sure that the cable was on the rollers and that sort of thing?

A No. As long as the door started opening, then the rollers were okay.

Q Why were you checking the cables and turnbuckles?

A Just to find out if there were any frayed wires or anything.

Q Okay. And why are you checking the turnbuckles?

A For the thread.

Q Now, would one of the purposes for your inspection be to fill out that barge condition report that you earlier referred to?

A No.

Q Okay. If you had seen the problem of, say, frayed wires or a turnbuckle maladjusted or something like that, would

that be a subject that would go into your barge report?

A That's correct.

Q Did you ever recall putting something like that in a barge condition report?

A I can't recall.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME III OF VII VOLUMES

PAGES 307-440

DATE: May 28, 1986

to you to be used when you're working at heights, when you have to work above a certain height level?

A There are safety belts that we have but I don't recall if there was any available at that particular pier during the operation that night.

Q What criteria or what heights do you usually have your men wear safety belts?

A I would say roughly about two containers high which is roughly about 16 to 17 feet.

Q How high was the top of this cargo door? Do you recall?

A The height of the door, I don't know the exact height but I would say in the vicinity of 13 to 16 feet.

Q And where the cables are at the very top, do you recall about how high that was?

A Can you show me on the diagram where you're referring to?

Q The cable that you pointed to that you grabbed, the highest cable, how high is that?

A Well, like I say, I don't know the real height, so I estimate it between 13 and 16 feet.

Q Okay. Why didn't you get a safety belt on the night of the accident to use? Any reason?

A No. Like I said earlier, when I first started there as a stevedore, the practice was to climb up the doors without any safety belt to unloosen the locks so that we can open the doors, and that was the practice and we were taught that way

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME IV OF VII VOLUMES

PAGES 441-607

DATE: May 29, 1986

Q That's still part of your stevedoring operation.

A That is still part of the stevedoring operation.

Q Okay. So, in terms of the stevedoring operations, after the barge house door is closed and secured, then the next step would be to clear the ramp way area, is that correct?

A That is correct, sir.

Q And what else before you secure your portion of the stevedoring operation?

A Well, put all our equipment away.

Q Your equipment.

A Our equipment.

Q The forklift and all the equipment that Castle and Cooke was using.

A That is correct, sir.

Q And all during this time Castle and Cooke is billing an hourly rate to the

vessel owner, is that true?

A I beg your pardon, sir?

Q During this time... . This is the time you people are billing for your time to the vessel owner, isn't that true?

A As far as checking and putting away the equipment, you know, it's part of the operation.

Q Do you have time cards?

A Time sheets?

Q Yes.

A Do I have a... .

THE COURT: When you were working there, did you have to have a time card for each man?

THE WITNESS: We don't have a time card, your Honor. We have a blank form we call time sheets, and whoever is in charge of the gang and added men to his

gang, they always keep track of how many men they have and what are they doing from this hour to this hour. They all put it down on this time sheet. Likewise for the machine operator, what equipment he is using and what he is doing with that particular equipment that he is using. But, as far as time cards, where you punch in and you punch out, we don't have that.

Q In respect to the time sheets, does the time sheet that you are referring to on the night of the accident, would it include time to remove the ramps and put away all the machinery?

A That is correct, sir.

Q And the time sheet would also include the operation you're working on, that is, what vessel you're loading and unloading, isn't that true?

A It has the vessel you're working on,

at what respective pier you're working at, you're loading back containers or general cargo, or discharge, all of those things.

Q Do you bill all the time to the vessel Oahu, for example, from the time you secure the barge house door, all the way through the time you put away your equipment?

A That is correct, sir.

Q And at what point does the time stop against the charges against the barge Oahu? Would it stop when everybody is off the barge and off the pier?

A This is correct, sir.

Q Okay. Let me make sure I understand. Stevedoring operations that was being billed for time, it starts when the vessel comes on to the pier and

Castle and Cooke people go aboard the vessel, is that right?

A It starts from the time we start the operation, that is correct, sir.

Q What triggers the commencement of the operation? Isn't it the opening of the ramp way going on to the barge, or is it from the time the barge comes in?

A Not necessarily, sir.

Q What usually triggers the start of the operation?

A It all depends on the load, how heavy the load is on the barge.

THE COURT: He's asking you when do you start keeping the time.

THE WITNESS: The time, sir, when these barges or any vessels come to the port of Hawaii, they notify our company what time they want our men to start to work on that particular vessel. So the night before we had the assignment that

tomorrow we'll start this particular vessel, normally

now over here on top as depicted in this exhibit?

A Yes, I do.

Q Do you see it?

A Yes, I do.

Q Do the positions of the cables, do they accurately depict the position of the cable as they were on the barge house on the Oahu on December 1980?

MR. ESTES: I'm going to object, your Honor. Lack of foundation. He hasn't even said he saw the barge at that time. He said he was the general manager but he didn't indicate he had anything to do with the barge operation.

MR. JIM ON: I can ask him.

Q Did you see the barge in 1980?

A Yes, I did.

Q How many times? Numerous times?

A Yes.

THE COURT: Go ahead and answer the question. Was it accurate, to your recollection?

THE WITNESS: Not exactly.

Q Could you explain?

A Well, the pulleys were actually higher up and the cables were higher up above the doors themselves and they were sort of recessed above the doors because, if they were like that, there was an opportunity for them to get tangled, so we had them actually higher up and somewhat recessed.

Q As far as the maintenance, inspection, repair of the barge and its equipment, that was the responsibility of

Marlin Pulliam, correct?

A Yes, it was.

Q Mr. Pulliam testified in his deposition, Mr. Stiger, that, as operations manager, he had a custom and practice of inspecting the equipment on the barge Oahu every time it came in to Honolulu. Was that your observation and understanding?

A Well, that's what I used to so, so you, know, when he came to Honolulu in that position, he simply carried on the duties that I had previously performed, yes.

Q And he also said that, as part of his inspection, he would inspect the cables, the bolts, the turnbuckles, the rigging system on the cargo doors. Did you ever do that when you were with HML?

A I believe that I did that on a sort of routine basis. I don't recall

specifically but it was sort of a habit thing that one did.

Q On the voyage of the barge Oahu when it arrived in Hawaii, December 22nd, was it...

A Yes.

Q ...at that time Marlin Pulliam was on vacation, is that correct?

A Yes. The records indicate that he was on vacation.

Q And I think he testified that he was in Portland at that

time.

A Yes. He was vacationing with his wife and family.

Q Would you know who took Marlin Pulliam's place on that voyage to do the inspection?

A Well, that responsibility fell back

on my shoulders to fill in for him while he was on vacation.

Q Did you do it?

A I don't specifically recall doing that particular function, but, past practices, that would have been an obvious duty that I would have performed, but that's a long time ago.

Q But you don't have any specific recollection that you did it in place of Marlin Pulliam on that particular voyage.

A No, sir, I do not.

Q Do you know if anybody else was assigned to do it?

A No. There would not have been anyone else.

Q What about Fran Yuen?

A No. I don't believe he would have done that as a routine part of his duties.

Q Was there anybody else that was trained to do the inspection that Marlin

Pulliam usually did as operations manager?

A Just myself.

Q During the year 1980, do you have any specific recollection that you performed any inspection of this nature in place of Marlin Pulliam?

A The only time that I would have done this as a normal

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME V OF VII VOLUMES

PAGES 608-733

DATE: May 30, 1986

Q What is Pacific Marine Lines specifically?

A It's a marine transportation company. Actually we're starting up this service. My employment started February 18 of this year, 1986.

Q And is this a company similar to Hawaiian Marine Lines?

A Yes, on a smaller scale..

Q Let me go back. You were working for Hawaiian Marine Lines in 1980, is that correct?

A Yes.

Q What were your functions... . Let me back up. What were your duties and functions for Hawaiian Marine Lines in 1980?

A Sales representative, marketing and sales, and also assist in operations at a later time.

Q How long were you working for Hawaiian Marine Lines?

A Approximately two years.

Q And in terms of sales and marketing, what would you do for Hawaiian Marine Lines?

A We generate new accounts for shipping and container loads, shipping out of the West Coast to Honolulu and back from Honolulu to the West Coast, and service existing accounts.

Q Who was your supervisor at that time?

A Immediate supervisor was Fred Muira.

Q And above him?

A Donald Stiger.

Q Why is it necessary for you to do that when it is being reloaded for sailing?

A Well, to insure that the load plan is

followed for one thing; and, if there is any damage to any cargo that is going to be set on the barge, any damage by stevedores or anyone, accountability of all cargo being shipped back, and to see that the operations go smoothly because we are representing Hawaiian Marine Lines.

Q Okay. Now, what do you recall about the accident that Mr. Kong was involved in?

A Well, I was on the barge Oahu.

Q Let me stop you there. About what time did this accident occur?

A It occurred probably around 1:00 a.m., between 1:00 and 2:00 a.m.

Q That's December 24.

A December 24.

Q And can you tell the judge what the overall climate and the lighting conditions were at that time just before the accident?

A Well, first of all, everybody was tired. It was still dark. There was still a lot of work to be done. I guess it was nearing the end of the shift itself. It was drizzling. It was not very lighted. You have your normal operations with portable lamps, and the lighting was somewhat assisted

certain barge.

Q Supervisors belonging to who?

A Castle and Cooke. Castle and Cooke people have that responsibility.

MR. KIDANI: Thank you, Mr. Yuen. I don't have any further questions.

THE COURT: Mr. Nagle.

MR. NAGLE: Yes, your Honor. Your Honor, may I have just a moment, please?

THE COURT: Surely.

CROSS EXAMINATION

BY MR. NAGLE:

Q Good morning, Mr. Yuen.

A Good morning.

Q It is my understanding that you were with HML for the period 1979-1980, is that correct?

A Yes.

Q During that whole period of time, were you a sales rep also?

A When you say the whole period, sir, yes, and added duties in operations.

Q Okay. As you mentioned, later.

A Yes.

Q And when did the added duties come on?

A I'm not exactly sure when. It could be several months

prior to December. I'm not exactly sure, sir.

Q And would it be fair to say that, even with the added duties during the period that you had the added duties, most of your time would be spent as a sales rep?

A Yes.

Q And did you have any background of training prior to coming to Hawaiian Marine Lines concerning how the barges work and what you should do on the barge?

A No.

Q Was your prior background in sales before coming to Hawaiian Marine Lines?

A Yes.

Q Would it be fair to say that you're not totally familiar with the operations of the maintenance on the barge?

A Yes.

Q Did you have any training from Hawaiian Marine Lines as far as what the required maintenance is on the barge?

A I would say no.

Q During the period of time that you worked with Hawaiian Marine Lines, would it have been your experience that during the times when the barges were loaded and unloaded generally there would be a HML representative present?

A Yes.

Q And ordinarily this would be the operations manager, is that right?

time?

A Yes.

Q With reference to exhibit number 1, could you show the Court where this snag or loop in the cable was when you saw it just prior to the accident?

A My best recollection is that the loop was here in this section here.

MR. NAGLE: Okay. May the record

reflect that Mr. Yuen is referring to the port side of the port door.

Q And I ask you, Mr. Yuen, with the aid of this red marker, if you would put in on the port door where the loop was.

(Witness complied)

MR. NAGLE: And the record should reflect that Mr. Yuen has done so. Thank you, Mr. Yuen. You can return to your seat.

Q And that loop was visible from where you were twenty-five to thirty feet away.

A Yes.

Q Did you see any other problems with the cable?

A Not to my knowledge, sir.

Q Is it your understanding that HML has control of the equipment on the barges that the stevedores do not run?

A Have control of the equipment? That's all part of the barge.

Q And HML is the company that inspects the equipment on

the barge?

A As far as I know, yes.

Q When Mr. Kong... . You said suddenly someone started shimmying up the batten boards. You said initially you didn't recognize it being Mr. Kong.

A No, because it was dark and the cable was defined.

Q Why was the cable defined?

A On these doors, the cable itself, it is quite common to see some sort of a loop there, not necessarily as drooping as what I'm showing, but it is evident that you can always see some kind of loop. Maybe the winch doesn't work. I don't know.

Q Every time that you have gone there

it is common to see some kind of loop on the cable?

A Yes and no, you know. I mean we're not always looking at the cables, you know.

Q But that's one of the jobs when you go down there, right?

A Yeah.

Q You take a look at the cables, right?

A Look at the cables, yeah.

Q So when you go down and look at the cable on the barge Oahu, what you usually see is a loop.

Q When the door is open, yes.

Q Aside from when the door is open.

A I can't recall.

by this particular occasion, what he is referring to.

Q At this time when the barge Oahu came

in to Honolulu Harbor from the 22nd to the 24th when you would handle Mr. Pulliam's usual job, did you inspect the cable system?

A I can't recall.

Q On this time when the barge came in to Honolulu, the time that I just mentioned to you, did you inspect the turnbuckle system?

A I don't believe I did, sir, because the doors were already open and there was no need for an inspection by myself.

Q Do you know if anybody inspected the system when the barge came in?

A I don't know that for a fact.

Q Is it the usual procedure for someone from HML to inspect the cable system and the turnbuckle system?

A I would assume so.

Q That's what you were taught.

A Yes.

Q Mr. Yuen, when you reattached the cable, you said you went up by means of a forklift, is that right?

A Yes.

Q And you were standing on a pallet, is that right?

A That's correct.

Q Did you have a safety belt at that time?

A I beg your pardon?

A. No. We have seen, not necessarily on this occasion, people go up there, but we had no objection. It's in the line of their duty, if they have to go up, they do it.

Q So it's in the line of the stevedores' duty to go up the batten boards and this is nothing unusual that you saw.

A Not necessarily, no.

Q Is that right what I just said?

A I mean, when I heard some commotion, I thought there was something going on so I just turned. I guess I turned; I looked at it, and someone was pulling a cable, yanking on a cable, and someone falling.

Q Okay. Did you take any steps toward the cable to try and see what the problem was with the system?

A No, I don't believe so.

Q Were you ever aware of the cable jamming prior to this particular accident?

A Not the cable jammed prior to this accident. On this same date?

Q No. At any time prior to the accident.

A Yes. There have been occasions.

Q And what was the usual procedure?

A They worked it out either with the

winch or with the forklift.

Q And, if you couldn't work it out with the winch or the forklift, then what?

A Then someone would go up and try to untangle it or try and find out if it was still on the runners, or try to free it from the entanglement or twisting or what have you.

Q Is that what Marlin Pulliam told you to do?

A No.

Q Did you ever undog the bolts on the door?

A I may have certain times.

Q And how would you... . Strike that. Were all of the bolts at arm's length from the dock?

A Not necessarily, no.

Q How would you go up there and undog

the bolts?

A With batten boards.

MR NAGLE: May I have just a moment, your Honor.

Q Mr. Yuen, at any time did you see any lock wires on the turnbuckle that you reattached?

A No. I don't recall seeing any lock wire.

Q Was there any canvas wrapping?

A No, sir. I don't recall that either.

Q Do you remember previously talking to an investigator by the name of Stu Hilt?

A Yes.

Q And you talked to him approximately in February of 1984, is that right?

A I guess so.

Q Did you ever tell Mr. Hilt that you didn't see the

THE WITNESS: John Lanagan, L-a-n-a-g-an. I reside at 2114 North Bryant Street, Portland 97207.

DIRECT EXAMINATION

BY MR. JIM ON:

Q Mr. Lanagan, could you please state your present occupation?

A I'm retired.

Q Prior to being retired, what did you do?

A I was superintendant operations manager for Hawaiian Marine Lines, Portland?

Q How long were you the cargo supervisor for Hawaiian Marine Lines in Portland?

A For about ten years.

Q So you were the cargo supervisor for Hawaiian Marine Lines at the time of Donald Kong's accident, which has been

testified occurred on December 24, 1980, is that right?

A Right.

Q Describe your responsibilities and duties as a cargo supervisor, please.

A What I do as a cargo supervisor is I arrange for the cargo to come across the Portland docks. I arrange and draw the cargo plan for the barge. I order the longshoremen. I supervise the loading of the cargo to the barge or the off-loading of cargo off the barge.

Q Now, you mentioned only Portland. You didn't go to other

areas, right? You were specifically the supervisor for the Portland area.

A You can be called to go to other areas.

Q In this case, we're talking about the

barge Oahu. Are you familier with that particular barge?

A Yes, I am.

Q Now, during November and December--I just want to clarify one point with respect to the voyages of the barge Oahu during that time period--you are familiar with the voyage scuedule of the barge Oahu during that time period November-December of 1980, right?

A Yes

Q During November-December of 1980, could you explain to the Court what was the route in terms of where the barge went and where it ended up and where it returned. Say, for example, take November. It has already been testified that it was voyage number 92.

A It was a Hawaiian voyage. We would load in Portland. The vessel would then go up Columbia River, pass Astoria, and

to Hawaii, unload, load, and come back to Astoria and then to Portland.

Q I want to clarify one thing. Is Seattle involved in any way? Does anything go to Seattle?

A Seattle is involved in this but on another barge.

Q But, as far as the Oahu is concerned, the operations of

A By that I mean the bolt.

Q Did you ever make that statement?

A I assume I did if you're reading that.

Q Will you look at page 14, lines 8 to 11.

THE COURT: Didn't he just say he said it?

MR. NAGLE: Fine. It's in the deposition. I wanted to show him the deposition.

THE COURT: You just read him the question.

Q Is that the testimony that you gave us in the deposition?

A Yes, and it is mixed up between bolting and unbolting and sliding the doors. Now, when I tell my man to open the doors, I tell them take the bolts off; and then you get into the second operation and you tell the stevedore to slide the doors.

Q Do you remember seeing canvas on the turnbuckle at any time?

A Not that I can recall.

Q Do you remember seeing lock wires on the turnbuckle?

A I have not come across any lock wires.

Q And you know Mr. Pulliam, don't you?

A Yes.

Q You met him back in 1975, is that correct?

A Or thereabouts.

Q And Mr. Pulliam worked with you in Portland before he came to Honolulu.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VI OF VII VOLUMES

PAGES 734-851

DATE: June 3, 1986

MR. KIDANI: Your Honor, may we submit our memo in opposition?

THE COURT: I have the memo. I'm going to reserve ruling on it. I think I need to do some checking.

MR. NAGLE: Fine. Thank you. May I proceed, your Honor?

THE COURT: Go ahead.

CROSS EXAMINATION (contd)

BY MR. NAGLE:

Q Mr. Wong, one of the opinions that you came up with in this particular matter was that the turnbuckle was improperly assembled, is that right?

A Yes.

Q Would you tell us what the basis of that opinion was, sir?

A That was based on the lack of safety wire, or lock wire, in lieu of the existing jam nut.

Q And was it the standard in the industry to have a lock wire on the turnbuckle?

A It was standard for pipefitters and riggers.

Q And where did you get the information that this was standard for pipefitters and riggers?

A I think exhibit 27 shows the rigging manual, and that's where it came from.

Q And when you were putting together your opinion as far

as the fact that the turnbuckle was improperly assembled, you relied upon plaintiff's exhibit 27 in reaching that conclusion, is that right?

A Yes.

Q And did you also come to a conclusion that a jam nut should not have been used

on the turnbuckle?

A Yes, I did.

Q And why is that, sir?

A Because a jam nut is not the ideal way to prevent rotation. It only prevents rotation in one basis direction.

THE COURT: Excuse me. It only prevents rotation what?

THE WITNESS: In one direction.

A And the other thing also is that it presents high stress, high residual stresses, when it is tightened.

Q And where did you get that information that the jam nut should not have been used on the turnbuckle?

A That's my opinion based on mechanical engineering analysis.

Q Is it also based in part on exhibit 27?

A Yes. It is also based on that. My opinion precluded the finding of this

manual.

Q What's the effect of having a jam nut on the turnbuckle?

A I think I just stated that.

Q Let me go back.

A Maybe I misunderstood your question.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VII OF VII VOLUMES

PAGES 851-End

DATE: June 4, 1986

I, Dianna W. Orndoff, Certified Shorthand Reporter, Honolulu, Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 82-0176, DONALD L. KONG, et al. vs HAWAIIAN MARINE LINES, INC., held in the United States District Court of Hawaii, Honolulu, Hawaii on May 22-23, 28-30, June 3 and 4, 1986, before the Honorable Charles L. Hardy, Judge.

September 2, 1986

/s/Dianna W. Orndoff CSR #170

No._____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

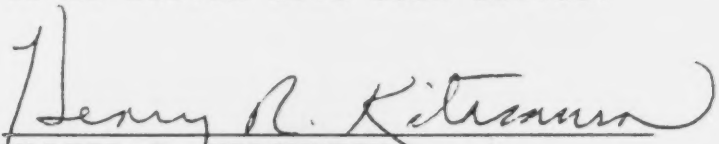
CERTIFICATE OF SERVICE

I, Henry N. Kitamura, a member of the Bar of this Court, hereby certify that on this 21st day of October, 1987 three copies of the Petition for Writ of Certiorari in the above entitled case were served by personal delivery upon the following at the address shown below:

GRANT K. KIDANI
300 Stanford Court
233 Merchant Street
Honolulu, Hawaii 96813
Attorneys for
HAWAIIAN MARINE LINES,INC.

JAMES T. ESTES, JR.
3100 Mauka Tower
Grosvenor Center
737 Bishop Street
Honolulu, Hawaii 96813
Attorney for
WILLAMETTE IRON & STEEL CO.
and GUY F. ATKINSON CO.

I further certify that all parties required to be served have been served.



WALTER S. KIRIMITSU
HENRY N. KITAMURA

SHIM, TAM, KIRIMITSU, KITAMURA
& CHANG
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
(808)524-5803

Counsel for Petitioners

87-760

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES TYLER ESTES, JR.
737 Bishop Street, #3100
Honolulu, HI 96813
(808)523-9833

Attorney for Respondents
WILLAMETTE IRON AND STEEL
COMPANY and GUY F.
ATKINSON COMPANY

Of Counsel:

BURKE, SAKAI, McPHEETERS,
BORDNER & GILARDY

November 18, 1987

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF RELATED CORPORATIONS.	iii
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE.	3
ARGUMENT	10
CONCLUSION	16
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES	PAGES
Munsey v. Webb, 231 U.S. 150 (1913)	11, 12, 15
Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952).	11, 12, 15

STATUTES

28 U.S.C. § 1254(1)	2
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq.	3

STATEMENT OF RELATED CORPORATIONS

Guy F. Atkinson Company is a subsidiary of Guy F. Atkinson Company of California. Willamette Iron & Steel Company, currently inactive, is a division of Guy F. Atkinson Company. Other divisions of Guy F. Atkinson Company include Atkinson Dynamics; Commonwealth Construction Company; Bingham-Willamette Company; Guy F. Atkinson Construction Company; Walsh Construction Company; Lake Center Industries; and Monterey Construction Company. Subsidiary corporations of Guy F. Atkinson Company include Atkinson KSA, Inc.; Atkinson Services; Atkinson Building Company; Atkinson Construction Company; Atkinson Development Company - Colbun; Guy F. Atkinson Construction Company, Ltd.; Atkinson-International (Aust.), Ltd.;

Atkinson-International Dominican Republic, Inc.; Atkinson-International Hong Kong, Ltd.; Bingham-Willamette Overseas; Columbia Services Company, Inc.; Commonwealth Construction Company; Equipment Engineering Corporation; Guy F. Atkinson Holdings, Ltd.; Guy F. Atkinson Company Export Company; Guy F. Atkinson Company - Overseas; Highway Rehabilitation Contractors; Lake Center Industries Transportation, Inc.; Offshore Hydro Services, Inc.; and Walsh Construction Company, Ltd.

NO. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Willamette Iron and Steel Company and Guy F. Atkinson Company (hereinafter collectively referred to as "Wisco") respectfully oppose Petitioners' Petition for a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for

the Ninth Circuit affirming the dismissal of Petitioners' claims against Wisco.

OPINIONS BELOW

The Memorandum Findings of Fact, Conclusions of Law and Order for Judgment of the United States District Court for the District of Hawaii and the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1987. The petition for a writ of certiorari was filed on October 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly affirmed the dismissal of the Plaintiffs' claims against Wisco, finding that there was no foreseeable connection between Wisco's allegedly improper repair work and the accident that ensued.

STATEMENT OF THE CASE

This appeal arises out of an admiralty action instituted pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq., for injuries sustained as a result of Donald Kong's fall on board the barge OAHU on December 24, 1980. (Petitioners' App. A, pgs. A-2 to A-10). The fall occurred while Mr. Kong, a supervisor for Castle & Cooke Terminals, and a group of longshoremen

were loading cargo aboard the OAHU. In carrying out the loading operations, the workers had to open and close the barge doors which were equipped with a cable and pulley system. (Petitioners' App. A, pgs. A-2, A-9 to A-10).

The cable system consisted of two winches, three pulleys, two turnbuckles, two gussets, and three cables: the open cable, the close cable and the follower cable. Two of the pulleys were located above and to the left of the port door and the third was above and to the right of the starboard door. The two winches were located to the left of the port door. One gusset was located at the top right of the port door, and the other was located at the top left of the starboard door. (Petitioners' App. A, pgs. A-3 to A-5).

The open cable was connected at one end to the open winch next to the port door. It then wound around one of the pulleys above the port door and connected to the left side of the port gusset. The close cable was connected at one end to the other winch, wound around the other pulley above the port door and connected to the left side of the starboard gusset. The follower cable, which operated to link one door's operation to the other, was attached on one end to the turnbuckle which was fastened to the right side of the port gusset. The follower cable then wound around the starboard pulley and connected to the turnbuckle attached to the right side of the starboard gusset. (Petitioners' App. A, pgs. A-4 to A-5).

When operated as designed, the doors opened by turning the open winch

so as to pull the port door to the left and simultaneously pull on the follower cable, forcing the starboard door to slide open to the right. The doors closed by turning the close winch which would pull on the starboard door, sliding the starboard door to the left. That movement also created a tension on the follower cable so that the port door would close to the right. (Petitioners' App. A, pg. A-5).

The OAHU's manual cable system was considered slow and tedious, however, so a practice had developed of using a forklift to pull the cargo house doors open and to push the doors closed. (Petitioners' App. A, pg. A-6). When employing the forklift method, slack in the cables was taken up by manual operation of the winch. Slack in the follower cable, however, could not be

taken up by the winches when opening the doors with the forklift unless the port door were pushed opened first. Additionally, slack could not be taken up when closing the doors with the forklift unless the starboard door were closed first. (Petitioners' App. A, pg. A-7). There was no evidence that Wisco had any knowledge that the forklifts were used to open and close the barge doors in lieu of the designed manual winch system.

Just prior to the accident, the workers had finished loading the cargo and were attempting to close the door with the forklift. In so doing, however, they incorrectly pulled the port door first. Slack consequently developed in the follower cable and the port door's cable. The men decided to take up that slack by manually operating the winch but could not find

the winch wheel. Despite that problem, the men continued to try to close the door with the forklift. Upon doing so the cables became entangled. (Petitioners' App. A, pgs. A-9 to A-10).

At that point one of the longshoremen, Mr. Wesley Furtado, climbed the batten boards on the barge doors to try to untangle the cables. Mr. Kong also climbed the batten boards and worked on the same cable line that Mr. Furtado had been manipulating in an attempt to free the cables. (Petitioners' App. A, pg. A-10). Mr. Kong did not use a safety device while carrying out his task even though safety belts were available. (App. A, pg. A-2 to A-3). When Mr. Kong reached the top of the door, he grasped the cables with both hands and yanked the cables with a whipping motion. Upon doing so, the follower cable separated

from a turnbuckle and Mr. Kong fell to the deck of the barge. (Petitioners' App. A, pg. A-10).

In October of 1980, two months prior to the accident, Wisco completed certain repair and maintenance work on the barge OAHU. Included within the repair work was the replacement of the opening and closing cables but not the follower cable. (Petitioners' App. A, pg. A-8).

After installing the new cables, Wisco adjusted the turnbuckles in the appropriate manner, lubricated them and covered them with canvas. (Petitioners' App. A, pg. A-8).

After the completion of Wisco's work, Hawaiian Marine Lines took over the custody and control of the vessel in order to carry out its cargo operations. Between the date of the completion of Wisco's work and the time

of the accident, the OAHU travelled from Portland to Honolulu, back to Portland, and then on again to Honolulu. (Petitioners' App. A, pg. A-10).

At the close of the Plaintiffs' case the District Court granted Wisco's motion to dismiss plaintiff's claims pursuant to Federal Rules of Civil Procedure, Rule 41(b). (Petitioners' App. A, pg. A-12).

ARGUMENT

The decision below affirming the district court's dismissal of the claims against Wisco is correct. There is no conflict between this Court's or any circuit court's prior decisions and that of the Ninth Circuit in the case at bar and there is no other basis for further review by this Court.

In Munsey v. Webb, 231 U.S. 150 (1913), this Court ruled that "[i]t was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." Id. at 156.

The United States Court of Appeals for the Fourth Circuit followed the Munsey rule in Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952), stating that "[t]o render one liable for negligence, it is sufficient that he should have foreseen that the negligence would probably result in injury of some kind to some person, and he need not have foreseen the particular consequence or injury that resulted." Id. at 550.

The Ninth Circuit's decision in the case at bar is not contrary to the rule

stated in Munsey, supra, and Virginian Ry. Co., supra. The appellate court herein did not rule that Wisco could not have foreseen the particular accident and resultant injury that Mr. Kong sustained; the court found that no evidence sustained a finding that Wisco could have foreseen the occurrence of any accident or injury as a result of a failure on its part to correctly repair the cables. (Petitioners' App. B, pgs. A-23, A-24). In that regard the court explained:

> There is no evidence in the record that would justify a finding that any reasonable repairman would have foreseen that workmen would place themselves in a position to be injured if the turnbuckle should work loose from the "following" cable installed to help pull the barge door open. The only foreseeable and untoward consequence of the turnbuckle coming loose in the proper operation of the winches would be that the door would not open, if closed, or close, if opened. Because the method chosen by the

> longshoremen to open the door consisted in pushing with a lift truck rather than pulling with the hand-operated winches (except to take up slack) there was no foreseeable connection between the repairman's alleged installation of the defective turnbuckle and the injury that befell this workman. More to the point, there was no reason for the repairman to foresee that any workman would climb up the door and use the cable for a handhold while shaking out slack caused by opening the door with a lift truck. Accordingly, we hold that there was no error in releasing Willamette Iron and Steel Company from liability ....

(Petitioners' App. B, pgs. A-23 to A-25).

The Ninth Circuit found support for its decision in the record below. That record is devoid of evidence establishing that Wisco could have foreseen such injuries.

In fact the only evidence that Plaintiffs did present on the issue of causation was in the form of oral

testimony by Plaintiffs' expert, Dr. Blundell. Dr. Blundell testified that if the doors had been operated appropriately by using the manual winch system rather than the forklifts, any improper repair work by Wisco would not have created a safety problem. (App. A, pg. A-5 to A-6). Assuming the proper operation of the doors, any deficiencies in Wisco's work would have created only an operational problem, preventing the workers from opening or closing the barge house doors. No evidence was presented to establish that Wisco knew that forklifts were being used to operate the barge doors in lieu of the manual winches. Consequently Wisco simply could not have foreseen that its repairs might cause the Plaintiffs', or anyone's, accident.

The dismissal of Plaintiffs' claims against Wisco was not based upon an erroneous application of this Court's enunciation of the limitations of the foreseeability requirement in Munsey v. Webb, supra. The dismissal of Wisco did not hinge upon a finding that Wisco could not have foreseen the particular method in which Mr. Kong's accident occurred. Rather, the decision was based upon a finding, supported by the evidence or lack thereof, that Wisco could not have foreseen any untoward consequences of its repair work that could be expected to endanger life or limb.

The Ninth Circuit's decision, therefore, was appropriate and does not conflict with either this Court's decision in Munsey v. Webb, 231 U.S. 150 (1913), or the Fourth Circuit's

decision in Virginian Ry Co. v. Viars, 193 F.2d 547 (4th Cir. 1952).

CONCLUSION

Respondents hereby respectfully request that this Honorable Court deny Petitioners' petition for a writ of certiorari.

DATED: November 18, 1987.

Respectfully submitted,

JAMES TYLER ESTES, JR.

Attorney for Respondents
WILLAMETTE IRON & STEEL COMPANY
and GUY F. ATKINSON COMPANY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I of VII VOLUMES

PAGES 1-156

DATE: May 22, 1986

off the barge Oahu.

A No, not with his crew; just he himself. The gang was not helping.

Q Isn't it true also that there are safety belts provided for by Castle and Cooke Terminals for stevedoring operations?

A Yes.

Q And on the night of the accident the safety belts were available to you and your men.

A No.

Q Weren't the safety belts... .

A On this barge Oahu, we would have mostly what you call break bulk cargo and there were no containers on this particular barge so safety belts were not required on this particular barge.

Q I know, but weren't they available? Didn't Castle and Cooke have safety belts?

A Oh, we had safety belts, but, on this particular barge, there were no safety belts.

Q You didn't use belts on this project.

A Because it was not required.

Q Okay. You didn't use any safety belts on this project.

A No, I did not.

Q The safety belts were available that night if you wanted to get them, isn't that true?

A It was available, if needed.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME II of VII VOLUMES

PAGES 157 - 306

DATE: May 23, 1986

affect the way the doors open or close together.

MR. ESTES: Let me split it up then.

THE COURT: That was your first question.

MR. ESTES: That was the first part of the question.

THE COURT: Restate your question.

MR. ESTES: I'll be glad to.

Q Mr. Blundell, if you assumed that the operators of that bargehouse door are using only the manual winch system to open and close the doors, isn't it true that the absence of a lock wire on either or both of the port turnbuckles may create serviceability problems, if you will, in terms of or operational problems, in terms of getting the doors to close together appropriately or properly but would not in effect create any safety problems?

MR. JIM-ON: I still have a problem because the questions are couched in terms of possibility, and, secondly, it is compound.

THE COURT: You may answer.

A The basic need for the lock wire here is not from the primary point of view of safety. The battening up of the turnbuckles will, as you say, only cause problems particularly in terms of operation of not getting the doors to close exactly where you want them to be. That's one reason for the turnbuckle, yes, sir.

Q Do you have any opinion as to whether or not it's appro-

NO. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

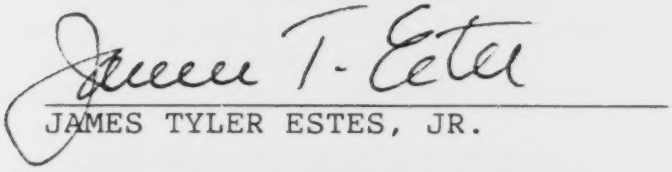
CERTIFICATE OF SERVICE

I, James T. Estes, Jr., a member of the bar of this Court, hereby certify that on the 18th day of November, 1987, three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were served by personal delivery upon the following at the addresses shown below:

WALTER S. KIRIMITSU, ESQ.
HENRY N. KITAMURA, ESQ.
333 Queen Street, Suite 700
Honolulu, Hawaii 96813
Attorneys for DONALD L. KONG and
MAY S. KONG

GRANT K. KIDANI, ESQ.
300 Stanford Court
233 Merchant Street
Honolulu, Hawaii 96813
Attorneys for HAWAIIAN
MARINE LINES, INC.

I further certify that all parties required to be served have been served.



JAMES TYLER ESTES, JR.

BURKE, SAKAI, McPHEETERS,
BORDNER & GILARDY
737 Bishop Street, Suite 3100
Honolulu, Hawaii 96813
Telephone: (808)523-9833

Attorney for Respondents
WILLAMETTE IRON & STEEL COMPANY
and GUY F. ATKINSON COMPANY

87-760 (3)

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a Delaware corporation; WILLAMETTE IRON AND STEEL COMPANY; GUY F. ATKINSON COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF RESPONDENT HAWAIIAN MARINE LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GRANT K. KIDANI,
Counsel of Record
KYLE A. THOMPSON
KIDANI - CRUDELE
233 Merchant St., Suite 300
Honolulu, Hawaii 96813
(808) 521-0933
Attorneys for Respondent Hawaiian Marine Lines, Inc.

1768P

QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals properly affirmed the finding that the vessel owner was not negligent.

2. Whether the Ninth Circuit Court of Appeals properly affirmed the dismissal of WISCO[1] on the basis that WISCO could not have reasonably foreseen that a loose turnbuckle would create an unreasonably dangerous condition.

---

[1] *Willamette Iron and Steel Company performed work on the subject barge including work on the turnbuckle.*

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 9

I. Petitioner is Attempting to Rekindle the Scheme Existing Prior to the 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act 9

II. The Ninth Circuit's Decision is Not in Conflict with a Prior Decision of this Court 14

A. The Ninth Circuit's decision is in accordance with this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos* 15

B. A shipowner is negligent only if a defect existing from the outset presents an unreasonable risk of harm 22

C. WISCO could not have reasonably foreseen that a loose turnbuckle would create an unreasonably dangerous condition 25

III. In the Alternative, Even if the Ninth Circuit Incorrectly Required that a Specific Injury Must Have Been Foreseen Before a Shipowner Will be Held Negligent, Such Error was Harmless 27

CONCLUSION 29

Appendix A. Trial transcript of proceedings A-1

Appendix B. Deposition transcript of George Chock taken July 24, 1984 ..... A-126

Appendix C. Deposition transcript of Robert Piatt taken August 20, 1985 ..... A-132

TABLE OF AUTHORITIES

CASES	PAGE(S)
Munsey v. Webb, 231 U.S. 150, 34 S.Ct. 44, 58 L.Ed. 162 (1913)	26
Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 256, 101 S.Ct. 1614, 48 L.Ed2d 1 (1981)	10-12, 15-18, 23-24
Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952)	26
STATUTES	
Rules of the Supreme Court of the United States, Rule 17(1)(c)	14
Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. §905(b)	11
TREATISES	
G. Gilmore and C. Black, Jr., *The Law of Admiralty* §6-5, at 280 (1975)	10

No. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT HAWAIIAN MARINE LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Hawaiian Marine Lines, Inc. ("HML") respectfully requests that this Court deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

Several years before the subject accident, which occurred on December 24, 1980, Castle & Cooke stevedores initiated the process of opening and closing the bargehouse doors on the barge with the assistance of a forklift[2,3], which process would often create slack in the cable wire. This slack would be removed using winches. The practice of properly using the forklift and taking up the slack was safe and did not pose an unreasonable risk of harm or danger to anyone.

---

[2] *(Record reference to App. _____. are to the Appendix filed by Petitioner. References to R.App. _____ are to the Appendices filed with this brief.)*

[3] *(R.App.A. A-27-29, A-63-65)*

The evidence clearly established that before the barge was turned over to the stevedores prior to the subject accident, the condition of the barge doors permitted cargo operations to be carried out with reasonable safety[4].

On the day of the subject accident, Petitioner DONALD KONG (hereinafter referred to as "Petitioner"), was assigned by Castle & Cooke, the stevedoring company for which he worked, as supervisor of the loading of the barge operated by HML. Castle & Cooke employees regularly supervised the loading and unloading operations

---

[4] *(R.App.A, A-132-137)*

including the opening and closing of the bargehouse doors[5,6].

On the day of the accident the Castle & Cooke stevedores attempted to close the port bargehouse door first rather than the starboard door, contrary to the regular practice[7], causing slack to develop in the cable of the port door[8]. There was no stevedore using the winch to take up any of the slack as was the usual practice, even though the winch wheel was on board the barge and

---

[5] *¶ III of the contract for stevedore services between HML and stevedore Castle & Cooke Terminals, Ltd. provides, in pertinent part: "[Stevedore] agrees to ... (g) perform one (1) opening and closing of vessel's cargo house doors...."*

[6] *(R.App.A, A27-28, A-60-63, A-80-82)*

[7] *(R.App.A, A-40-41, A-41-45, A-55-56)*

[8] *(R.App.A, A-2-3, A-40-41, A-55-58, A-84-87)*

the winches were operable[9]. The slack in at least one of the cables caused it to become entangled with one or both of the other cables so that the starboard door would not completely close[10].

In an attempt to untangle the cables, Petitioner ascended the starboard door without regard for his personal safety by not using a safety belt, personnel carrier or ladder, all of which safety devices were available[11]. Upon reaching the top of the 16 foot starboard door, and while balancing on the batten board, Petitioner grabbed one of the door cables with one hand and the other in his

---

[9] *(R.App.A. A-47-50)*

[10] *(R.App.A. A-2-3, A-40-41, A-55-58, A-84-87)*

[11] *(R.App.A. A-13-15, A-22-23, A-33-36, A-45-46, A-67-70, A-92-101, A-114-123, A-127-131)*

other hand and began to "whip" both cables by jerking, turning, and rotating them over one another trying to untangle them[12]. As a result of his whipping motion the right bolt end of the cable unthreaded from the body of the turnbuckle and became disengaged from the starboard turnbuckle[13]. When the follower cable came loose from the starboard turnbuckle Petitioner lost his balance and fell onto the forklift below him[14].

Although an HML representative was present on the barge at the time of the accident, he was not aware that the bargehouse doors were being closed in a manner opposite to the way in which the

---

[12] *(R.App.A, A-3-7, A-8-11, A-15-21, A-23-25, A-43-45, A-58-60)*

[13] *(R.App.A, A-109-114)*

[14] *(R.App.A, A-3-5)*

doors were normally closed, and was not aware of the subsequent entanglement. No Castle & Cooke employee notified the HML representative that the starboard door was jammed, that the cables were tangled or that Plaintiff would ascend the starboard door and grasp one loose cable in one hand and the other loose cable in the other[15].

An investigation the following morning revealed that the bolt holding the end of the follower cable at the starboard turnbuckle had unscrewed and separated from the turnbuckle. There was no locking wire through the hole at the end of the bolt latched onto the barrel[16].

---

[15] *(R.App.A, A-52-55, A-76-92)*

[16] *(R.App.A, A-7-8, A-10-13)*

HML did not know that the bolt was unloosening from the starboard turnbuckle above the doors. During the barge's first voyage to Honolulu after leaving Portland, an HML operations manager had visually inspected the turnbuckles above the doors from the deck and did not see any improperly attached turnbuckle or one that needed adjusting[17]. Further, when the Oahu returned to Portland, the senior port engineer for Columbia Marine Lines stood on the deck to check for loose, broken or hanging cable and did not notice any[18]. When the Oahu arrived in Honolulu two days before the accident, as part of his normal routine HML's area manager looked at the cable to see if it was intact and taut, and he observed that

---

[17] *(R.App.A, A-30-33)*

[18] *(R.App.A, A-103-106)*

it was[19].

HML neither knew nor had any reason to know of the absence of lock wires; prior inspection of the Oahu did not indicate the lock wires were absent, and, significantly, no turnbuckle bolt had ever separated from the turnbuckle on an HML barge cargo house door[20]. In any case, lock wires were not necessary for the safe closing of the bargehouse doors[21].

REASONS FOR DENYING THE WRIT

I. PETITIONER IS ATTEMPTING TO REKINDLE THE SCHEME EXISTING PRIOR TO THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBORWORKERS' COMPENSATION ACT

Prior to the 1972 Amendments to the Longshoremen's and Harbor Workers'

---

[19] *(R.App.A, A-70-74)*

[20] *(R.App.A, A-30-33, A-65-67, A-70-74, A-90-92, A-101-102, A-103-107)*

[21] *(R.App.A, A-37-38)*

Compensation Act, proof of unseaworthiness required no proof of fault on the part of the vessel owner other than an unsafe condition on the vessel. "This was true even though the condition was caused, created, or brought into play by the stevedore or its employees." *Scindia Steam Nav. Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 1620-21, 68 L.Ed.2d 1 (1981) (citations omitted). The 1972 Amendments, particularly by adding §905(b), "... radically changed this scheme of things[,]" *Scindia*, 101 S.Ct. at 1621, and "have been hailed as a much-needed reform which will substantially lighten the dockets of the over-burdened federal courts." G. Gilmore and C. Black, Jr., *The Law of Admiralty* §6-5, at 280 (1975).

After 1972 a longshoreman was entitled to significantly greater

compensation from the stevedore, and his right to recover for unseaworthiness was abolished. In addition the stevedore's obligation to indemnify the shipowner, if the shipowner was held liable to the longshoreman, was abolished. 33 U.S.C. §905(b) *et seq.*; *Scindia*, 101 S.Ct. at 1621. The 1972 Amendments, however, still provided the longshoreman with the right to recover from the shipowner for negligence, but for only two particular scenarios of negligence. Since 1972 the vessel and equipment provided to the stevedore must be in such condition that cargo operations may be executed with reasonable safety, and the shipowner must warn the stevedore of any hazards present on the ship which the shipowner should have known about in the exercise of reasonable care. *Scindia*, 101 S.Ct. at 1622.

The 1972 Amendments and their impact

on the liability of vessel owners was discussed by this Court in *Scindia*, 101.S.Ct. at 1620-1621, and footnotes 11-13. While considering the application of the 1972 Amendments in *Scindia* this Court held:

> Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected. (citations omitted) It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the loading or unloading process.... "[C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would ... saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." (citation omitted)

Scindia, 101 S.Ct. at 1622-1623.

Respondent HML respectfully submits that any expansion of a shipowner's

liability beyond that which is delineated by the 1972 Amendments and as discussed by this Court in *Scindia* is a matter most appropriately left to legislation. Petitioner, however, is attempting to return to the pre-1972 scheme of things by expanding the liability of shipowner HML.

As will be more fully discussed below, and as already decided by this Court in *Scindia*, HML is only negligent if it failed to provide the stevedore with an unreasonably safe barge or if it failed to warn the stevedore of an unreasonably safe hidden defect. After considering all of the evidence, after listening to all of the witnesses, and after considering the totality of facts, the Ninth Circuit Court of Appeals has already determined as a conclusion of law that HML met its duty by providing the stevedore with a vessel upon which safe

operations could reasonably be conducted, and was not negligent[22,23].

II. THE NINTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH A PRIOR DECISION OF THIS COURT

Pursuant to Rule 17(1)(c) of the Rules of the Supreme Court of the United States a review on writ of certiorari will be granted "only when there are special and important reasons ... ", such as when a federal court "has decided a federal question in a way in conflict with applicable decisions of this

---

[22] *HML questions the litigious nature of Petitioner's position in light of the fact that Petitioner has already been generously compensated and shall continue to be compensated as a result of his injuries, pursuant to the 1972 Amendments. Thus, Petitioner has already benefited from the more streamlined and timely compensation scheme established by the 1972 Amendments and has avoided the inefficient and tedious pre-1972 tripartite system of seeking compensation for a maritime-related injury.*

[23] *(App. B, p. A-37)*

Court." Petitioner herein contends that the Ninth Circuit misinterpreted this Court's holding in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981). Thus the Ninth Circuit's decision in this action should not be reviewed on writ of certiorari unless (1) its decision conflicts with *Scindia* and (2) such a conflict is deemed special and important enough to warrant a review.

A. The Ninth Circuit's Decision is in accordance with this Court's Decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*

In its Memorandum filed July 23, 1987[24], the Ninth Circuit cited *Scindia* and affirmed the trial court's finding of no third-party liability:

> The primary responsibility for maintaining safe conditions on board a vessel during cargo operations

---

[24] *(App.B, A-29-30)*

> rests on the stevedore. (citation omitted) A shipowner may also incur liability toward longshoremen employed by stevedores but only in circumstances where the shipowner has breached a duty to intervene or warn of a hazard. Such a duty may arise when the owner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation. *Scindia*, 451 U.S. at 175-176. (emphasis added)

The Ninth Circuit's interpretation and application of *Scindia* was not, as Petitioner contends, erroneous. *Scindia* sets forth the standard of care that a shipowner owes to a stevedoring company. A longshoreman in *Scindia* sued the shipowner for injuries suffered as a result of a malfunctioning winch which was part of the ship's gear. With respect to the duty owed by a shipowner to a stevedore at the outset of cargo operations when the ship is turned over to the stevedore, this Court set forth

the following standard of care:

> [T]he duty of exercising due care "under the circumstances[,]" ... extends at least to excercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, ... 101 S.Ct. at 1622. (emphasis added)

Secondly, this Court held that no general duty was owed by a shipowner to a stevedore after the beginning of cargo operations:

> [A]bsent contract provision, positive law, or custom to the contrary -- none of which has been cited to us in this case -- the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore.... The shipowner within limits, is entitled to rely on the stevedore, and owes no duty to the longshoreman to inspect or supervise the cargo operations. 101 S.Ct. at 1625. (emphasis added)

Thus Respondent need only have delivered the barge to the stevedore in a

condition which, with the exercise of reasonable care, the stevedore could unload and load with reasonable safety. Further, Petitioner had no duty whatsoever to supervise or inspect "dangerous conditions" that may have arisen during the course of the unloading and loading of the barge.

Before a shipowner can be found negligent under *Scindia*, it must have had actual or constructive knowledge of the existence of an unreasonable risk of harm, must know that the longshoremen will continue to work despite the unreasonable risk of harm, and cannot reasonably expect the stevedore to remedy the unreasonable risk of harm. *Scindia*, 101 S.Ct. at 1626.

Petitioner, however, asserts that the Ninth Circuit misapprehended the facts by holding Respondent was not negligent "because it could not reasonably forsee

[sic] that the cable would unscrew from the turnbuckle and that there would be no locking wire to prevent the turnbuckle from separating from the cable." The Ninth Circuit's decision was not as simple and solely focused on the missing turnbuckle as Petitioner makes it appear.

The Ninth Circuit found that the manner in which the longshoremen opened and closed the bargehouse doors was "safe and efficient", and that prior to the subject accident there were no known incidents where a bolt had disengaged from a turnbuckle[25], and that while on two occasions before the subject accident longshoremen had failed to use the winches to take up the slack, thereby entangling the cables, on both occasions

---

[25] *(App.B, A-35)*

the longshoremen untangled the cables "without injury or risk to anyone."[26]

In addition, the Ninth Circuit determined that it was not reasonably foreseeable that manually untangling the cables would cause the cables to disengage causing Petitioner's fall and injuries, and concluded that the district court's factual determination that Respondent was not negligent was not clearly erroneous[27].

Finally, the Ninth Circuit found that HML's representative was not consulted at anytime prior to the accident by any of the stevedore's employees even though he was present on the barge at the time of the accident[28]. Thus, HML was not aware that the barge doors had jammed

---

[26] *(App.B, A-27)*

[27] *(App.B, A-36-37)*

[28] *(App.B, A-28-29)*

because the doors were closed in the wrong order, and was not aware that Petitioner had attempted to untangle the cables by grasping the two loose cables with each hand[29].

The standard for finding a shipowner negligent in accordance with *Scindia* has not been met in the instant case because, as the Ninth Circuit properly found, the manner in which the longshoremen opened and closed the bargehouse doors, even without the locking wire, did not present an unreasonably dangerous condition[30]. Petitioner is asking this Court to disagree with one of the Ninth Circuit's findings by asserting the Ninth Circuit misinterpreted this Court's holding in *Scindia*.

---

[29] *(App.B, A-28-29)*

[30] *(App.B, A-35-36)*

B. A shipowner is negligent only if a defect existing from the outset presents an unreasonable risk of harm.

Petitioner also contends *Scindia* holds that if a defect proximately causing an injury exists from the outset the shipowner is liable. The nature of the defect in *Scindia* differed significantly from the missing locking wire in the subject incident. In *Scindia* this Court stated:

> On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to ... longshoremen was a matter of judgment committed to the stevedore in the first instance. The malfunctioning being obvious and Seattle having continued to use it ... it is quite possible, ... that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's

> winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition. (emphasis added)

Scindia, 101 S.Ct. at 1626.

The defect in *Scindia* was egregious and had been obvious for two days prior to the accident. This Court opined that shipowner Scindia should have realized the defect presented an unreasonable risk of harm had it known of the defect, and thus had a duty to intervene. *Scindia*, 101 S.Ct. at 1626. This Court did not, however, hold in *Scindia* that a shipowner has a duty to intervene in all cases in which a defect exists from the outset, and breaches its duty when it fails to intervene. This Court stated that "[o]n the facts posited here ... " the shipowner should have realized the defect presented an unreasonable risk of harm since it was so obvious and had been recognized as such for two days.

Scindia, 101 S.Ct. at 1626. Respondent HML respectfully submits that this Court meant a shipowner must be deemed to have been aware of a defect existing from the outset when such a defect presents an unreasonable risk of harm.

There was no finding of fact that Respondent failed to have the barge inspected prior to being used by Petitioner, or that Respondent was negligent in failing to locate the missing locking wire. The Ninth Circuit further failed to find that the missing locking wire, whether or not Respondent or anyone knew or should have known it was missing, presented an unreasonable risk of harm to Petitioner or anyone else. To the contrary, the Ninth Circuit stated:

> Before the accident there were no known incidents where a bolt had ever disengaged from a turnbuckle on cables above the barge door. It would have been reasonable to expect

> that even if a bolt holding an end of a follower cable were to unscrew from its turnbuckle, the cable would merely lose tension and lay on the door mechanism without posing any risk to workmen....In summary, the vessel's duty to warn arises only with respect to hazards that would be likely to be encountered by the stevedore in the course of normal cargo operations.[31]

C. WISCO could not have reasonably foreseen that a loose turnbuckle would create an unreasonably dangerous condition.

The Ninth Circuit did not err in affirming the dismissal of WISCO. The Ninth Circuit found that "there was no foreseeable connection between [WISCO's] alleged installation of the defective turnbuckle and the injury that befell [Plaintiff]."[32] In other words, WISCO could not have expected that a loose turnbuckle would create an unreasonably

---

[31] *(App.B, A-35-36)*

[32] *(App. B, p. A-24.)*

unsafe condition. The Ninth Circuit found no evidence in the record to suggest WISCO should have reasonably contemplated that a loose turnbuckle would create an unreasonably unsafe condition[33].

Both of the cases cited by Petitioner in support of his foreseeability argument involve circumstances where obvious danger exists. In *Munsey v. Webb*, 231 U.S. 150, 34 S.Ct. 44, 45, 58 L.Ed 162 (1913), "the possibility and the danger that in some way one in the car should get some part of his person outside the car while it was in motion was obvious, and was shown to have been anticipated ...", while in *Virginian Ry. Co. v. Viars*, 193 F.2d 547, 549 (4th Cir. 1952), the injury was caused by dynamite,

---

[33] *(App. B, p. A-23.)*

"which is obviously a dangerous instrumentality ...[.]"

The Ninth Circuit properly affirmed the dismissal of the claim against WISCO since it was not reasonably foreseeable that a loose turnbuckle would create an unreasonably dangerous condition such as the dynamite in *Virginian* and the open elevator in *Munsey*.

III. IN THE ALTERNATIVE, EVEN IF THE NINTH CIRCUIT INCORRECTLY REQUIRED THAT A SPECIFIC INJURY MUST HAVE BEEN FORESEEN BEFORE A SHIPOWNER WILL BE HELD NEGLIGENT, SUCH ERROR WAS HARMLESS

As discussed above, *Scindia* holds that a shipowner has a duty to warn against dangerous conditions and need only ensure its vessel is in a condition upon which work can be accomplished in a reasonably safe manner. The Ninth Circuit, as the trier of fact, considered all of the evidence and determined that the use of a forklift to open and close

the bargehouse door was a reasonably safe procedure, and further found that even with a loose turnbuckle it would be "reasonable to expect that ... the cable would merely lose tension and lay on the door mechanisms without posing any risk to workmen."[34]

Thus, even if the Ninth Circuit erroneously concluded that the shipowner must have foreseen the specific injury and method of injury before it can be found negligent, the Ninth Circuit also interpreted *Scindia* in a fashion properly outlining the duty of a shipowner to present the vessel in a reasonably safe condition. The Ninth Circuit found the barge was in fact in a reasonably safe condition and that the loose turnbuckle and missing locking wire did not render the barge unsafe.

---

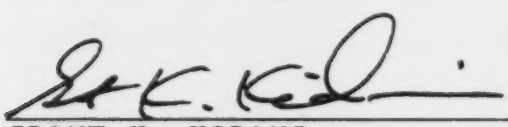
[34] *(App. B, p. A-35-36)*

CONCLUSION

The Ninth Circuit properly applied *Scindia* to the instant action in finding that HML provided Plaintiff with a vessel upon which it was reasonably safe to work. The Petitioner has lost on the merits. The decision of the Court of Appeals is clearly correct on the facts and law and should be allowed to stand without further review.

DATED: November 19, 1987

Respectfully submitted,



GRANT K. KIDANI,
Counsel of Record
KYLE A. THOMPSON
Attorneys for Respondent
Hawaiian Marine Lines, Inc.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF VII VOLUMES

PAGES 1-156

DATE: May 22, 1986

Donald Kong approached me, and I looked for myself and finally we found it on the barge but far away from where it should have been.

Q And this was after the accident already.

A Yes, after the accident.

Q Could you proceed and tell us, as you tried to close the doors with the forklift, what happened?

A When we tried to close the doors with the forklift, what happened was the cable on the top somehow got tangled, and Donald Kong, the operating supervisor at that time, was standing next to me and Wesley Furtado, George Chock, and the forklift operator, what you call, Joe Flores at that time, operating Hyster 464; and, when the thing got tangled, Wesley Furtado climbed up on the right side of the door, I mean on the left side

of the door to see what the problem was.

Q When you say the left side of the door, was that on the port door?

A When you're facing the door, looking at it from here, that's the port there, yes, on the left.

Q So Mr. Furtado went up on the port door to check to see what was wrong.

A Yes, he did.

Q And what about Mr. Kong?

A Then since Wesley, what you call, had problem up there trying to untangle that cable, Donald Kong, he climbed up also

A Yes.

Q And his right hand?

A The right hand grabbed the one that was entangled.

Q The top cable here?

A Yes.

Q And were these two cables slack or tight?

A Because they were tangled, there was a lot of slack on them.

Q And then what happened?

A When he tried to whip the cable to have it untangled, the motion he did was he grabbed the cable and with his right hand he tried to whip it, you know. When he did that, whatever, somehow the end of the turnbuckle came off. So, with that motion that he had and the strength that he used to untangle the cable--he just whipped it this way--when he did that with that motion, when he whipped it he just fell backwards. He just came down backwards, and then, when he landed, he landed on the 464 prong that's approximately, what you call, ten inches wide and four feet long. So he landed on that Hyster prong there which prevented him from, I guess, more serious injury.

That actually broke the fall of Donald Kong, because the prong was approximately a foot or so above the deck of the barge.

Q After he fell, did you inspect what actually came off?

A Yes, I inspected because knowing the serious injury. The

end of the turnbuckle there came off.

Q All right.

THE COURT: Did you say he grabbed the turnbuckle?

THE WITNESS: What he tried to do was... . There was a tangle on the cable. In other words, it was just overlapping, you know; the opening and closing wires, they were overlapping one another. So, to have it untangled, what he did was just to whip it, try to throw it over; and, when he did that trying to throw it over, what happened is that the

end of the turnbuckle came off. With that motion, he just came down backwards.

Q So when the end of the turnbuckle came off, that caused Mr. Kong to lose his balance and fall off, is that correct?

A Yes.

Q Now, can you tell us... . Could you come down one more time, Mr. Tanaka, because this is important. Is it the end of the starboard turnbuckle that came off?

A Yes, on this end here.

Q All right.

A The starboard turnbuckle.

Q I'm going to show you an exemplar of a turnbuckle with U-bolts on both ends. Is this a similar type of turnbuckle that was on the starboard metal plate as far as the outline, the same type of turnbuckle?

A It's not exactly the same but close enough.

Q The actual one, how is it different?

A I think it was a little larger turnbuckle and heavier turnbuckle than this.

Q Larger and heavier in size.

A Yes, sir.

Q All right. Now, after the accident, did you investigate and inspect what actually came off?

A This end of the turnbuckle came off.

Q When you say this end, looking at the door it would be to the right side?

A The right side the turnbuckle came off.

Q So this whole bolt came off?

A Yes, the whole bolt came off.

Q And the cable wire that was attached to the U-part of the bolt, U-clamp, that

wire came off also, is that correct?

A Oh, that was still attached to here. The whole thing came off, yes.

Q Including the cable wire.

A Yes, sir, right.

Q And that cable wire that came down or came off with this bolt, was that the cable wire that Mr. Kong was holding with ... . Which hand?

A Right hand.

Q Right hand.

A Yes.

THE COURT: Mr. Kirimitsu, let's take a recess for about 15 minutes.

MR. KIRIMITSU: All right.

THE COURT: We stand in recess.

(Recess taken)

MR. KIRIMITSU: Your Honor, for the record, counsel took the librety of drawing in the hatch or what I understand

is the manhole into the diagram.

THE COURT: All right.

MR. KIRIMITSU: As you can see, your Honor, the attorneys are not artists, but it's generally within the confines of what is the manhole.

Q. Mr. Tanaka, before we took the recess, you were describing which wires or which wire Mr. Kong was holding on to. Could you come down to this chart, to the diagram, and demonstrate to yuor Honor which cable was he holding with his right hand, which left, and which actually came off. You can use the pointer or whichever is easier.

A. Donald Kong had his left hand right next to this turnbuckle here. There was tension on this cable.

Q. That wire attached to the starboard turnbuckle, it did have tension, right?

A. Yes. It had tension on it. That's the reason why Donald held on this top

cable here.

Q. Okay.

A And the entanglement was right here, by this roller here. Somehow this cable being slack overlapped the top cable.

Q The lower cable was slack.

A Yeah. Somehow it got tangled with the top cable, and what he tried to do was, with his right hand, looking at this roller here, he tried to untangle it by just throwing it over.

Q Which cable did he hold on to with his right hand?

A With his right hand he held this cable that was loose here.

Q That's the slack cable, the lower cable.

A The lower cable that was slack.

Q And the tight cable with the tension

was on the upper cable which he held on with his left hand, is that correct?

A Yes, he did.

Q And the cable and bolt that came off, can you point that out?

A The cable that came off was the cable that he held with his left hand right next to this turnbuckle here.

Q And that caused him to lose his balance and fall off?

A Yes.

MR. KIDANI: Your Honor, I'm going to move to strike the response. The question is too leading, especially in this area of causation.

THE COURT: All right. Sustained.

Q All right. Mr. Tanaka, can you resume your seat, please?

A We just call it, what you call, a locking wire. That's the whole purpose of this turnbuckle.

Q Have you seen the locking wire used in other turnbuckles?

A Yes. Any time we lash heavy lifts, such as tanks, trucks, we always use the locking nut on the turnbuckle, and we also use the locking wire. That's recommended. Otherwise, the insurance inspector won't pass this lashing or whatever is done.

Q When you mention lashing, what do you mean by lashing?

A We use heavy chain and turnbuckles to lash down tractors, trucks. When we say lashing, it's to prevent the thing from shifting, you know.

Q So basically you're tying it down.

A Tying it down so that it doesn't shift while it's in voyage.

Q So, upon your inspection of the cable that came loose and was hanging down, did you see any jam nut or locking nut on the cable that was loose?

A Yes. There was a jam nut but it wasn't tightened; just on the thread itself.

Q Let me refer you to the time that the cable was still hanging down as opposed to the cable being reattached later. At the point when the cable was hanging down on the side, the way you drew it, first of all, was there a U-bolt attached to that cable that was hanging down?

off the barge Oahu.

A No, not with his crew; just he himself. The gang was not helping.

Q Isn't it true also that there are safety belts provided for by Castle and Cooke Terminals for stevedoring

operations?

A Yes.

Q And on the night of the accident the safety belts were available to you and your men.

A No.

Q Weren't the safety belts... .

A On this barge Oahu, we would have mostly what you call break bulk cargo and there were no containers on this particular barge so safety belts were not required on this particular barge.

Q I know, but weren't they available? Didn't Castle and Cooke have safety belts?

A Oh, we had safety belts, but, on this particular barge, there were no safety belts.

Q You didn't use belts on this project.

A Because it was not required.

Q Okay. You didn't use any safety belts on this project.

A No, I did not.

Q The safety belts were available that night if you wanted to get them, isn't that true?

A It was available, if needed.

A When he went to the top, what he did was grab the cable with his left hand.

Q Let me get into that just briefly. I think you said a couple of different things. I may be wrong and I may be the one confused. Would you tell me again which hand Mr. Kong used to place on the top cable?

A He placed his left hand next to the turnbuckle.

Q Now, you're referring to the turnbuckle on the starboard door.

A On the starboard door, yes.

Q Which side of the turnbuckle was his hand? As we look at the picture here,

was he on the left side of the turnbuckle or the right side?

A The right side of the turnbuckle.

Q Okay. And he put his right hand on the bottom cable?

A Yes.

Q Okay. And which cable was stuck?

A The bottom cable.

Q Okay. When you talked about the whipping motion that Mr. Kong did, which arm did the whipping motion?

A He whipped it with his right hand because his left hand was on the cable with the tension on it.

Q So that means he was whipping with his right hand.

A Yes. His left hand was on the cable with the tension. There was tension on the left-hand cable, and the right-hand

cable was the one that was entangled and

that was sagging.

Q Do you remember testifying at your deposition, Mr. Tanaka, that Mr. Kong whipped the cable with his left hand?

A I don't recall that.

MR. ESTES: Can I have Mr. Tanaka's deposition again? Page 55, lines 8 through 14.

(Deposition handed to the witness)

A Oh, yes, this incident here, if I recall now, Kong was communicating with Wesley Furtado there that in between there was an entanglement. So, to take off the entanglement, between Wesley and Donald Kong, Donald whipped with the left hand for the cable that was in between. There was an entanglement between... . You see the door over here?

Q Why don't you come down to the diagram here?

A So at that time, like I said, he was

whipping, he was trying to untangle the cable here. There was an entanglement here. So he whipped with his left hand; and then later on he noticed that the entanglement was here.

Q So there were two entanglements.

A Yeah, right.

Q Okay. Now, the first entanglement that you talked about was over here by what has been identified on this... .

A Yeah, here.

Q Wait. The first one that you talked about was over here next to the follower pulley on the right side of this picture,

Right?

A Yes.

Q And I think you said that the bottom cable got somehow looped over the top cable.

A Looped over the top cable.

Q Would you describe to me what kind of jam or entanglement you're talking about now over here by the... . I think you pointed toward the port turnbuckle.

A The cable was overlapping one another.

Q Which cable was overlapping which?

A At that time I cannot say from where I was standing, but there was an entanglement there.

Q Okay.

MR. ESTES: You can resume your seat.

(Witness resumed the witness stand)

Q Now, in your deposition, if I can read it for you, it says: He tried to untangle the cable by whipping the cable with his left hand, which doing so he just came down head first and landed on the prong.

Now, are you telling me now that there were two times when he whipped the cable, or only one time and that was before he fell?

A As I recall, there was entanglement here and on the pulley itself.

Q Immediately before he fell, was he whipping a cable?

A Yes.

Q Which cable?

A The cable that was loose.

Q The cable that was loose?

A Yes. The cable that was hanging, the underneath cable.

Q And could you tell by his actions which of the entanglement he was trying to free at that time?

A The bottom cable.

Q Well, let's ask it this way. There is one on the right side and one on the

left side. Isn't that what you told me?

A Yes.

Q Okay. Was it the one on the left side or the one on the right side that he was trying to free?

A At that time it was both sides. They tried both sides, you know, the center and, what you call, the right side; the left and the right side.

Q As far as you can tell, was it the same cable that was tangled, only in a different location?

A Yes.

Q Okay. How far away were you from Mr. Kong when he was at the top of the door?

A I would say about 14 feet away.

Q Now, is that all up in the air like this or... .

A From the door, because there was a forklift in front of me, so I kept distance away from the forklift.

THE COURT: Six feet.

Q Mr. Tanaka, wouldn't it have been possible for a person to climb a barge door to wrap a safety belt around one of these vertical members? I think you called them ribs before. Can you secure yourself to the door in that fashion?

MR. NAGLE: Objection. Speculation; calling for a conclusion.

MR. ESTES: Your Honor, I'm just asking whether or not the belt was of sufficient dimension to go around the vertical members there.

THE COURT: You may answer. Go ahead.

A Well, in this particular operation, what you call, we never did use safety belts to unbolt the doors; so I don't think any safety belts were required.

THE COURT: What he was asking, Mr. Tanaka, was, if a man had been

wearing a safety belt, could he have swung it around one of the vertical columns there and clip it to his belt to support himself.

THE WITNESS: Yes. If he had a safety belt, he could have done that, yes.

Q I just want to get one other thing clear. I believe that you stated, and tell me if I'm wrong, that the other barge that belonged to Hawaiian Marine Lines, one other than the barge Oahu, had already been loaded and locked up and shut up and everybody had quit working on that barge; is that

BY MR. KIDANI:

Q Mr. Tanaka, first of all, isn't it true that the cables up above are not safety line cables? Isn't that true?

A They are not, yes.

Q They are not meant to be used for crew members or anybody else as a safety line, isn't that true?

A That's right.

Q In respect to your testimony with Mr. Estes, you indicated that... . I want to get this straight, too. Is it your testimony that Mr. Kong whipped one of the cables with his left hand and the other cable on another occasion with his right hand?

A Well, after I read my depo, you know, thinking back, I recall there was an entanglement in between Wesley and Donald Kong and there was an entanglement on the starboard side of the pulley where Donald was.

Q Did he whip the cable two times?

A He must have whipped it twice, yes.

Q Your testimony now is he whipped it twice.

A I think he did. After I read my

depo, yes.

Q And you don't know who... . Strike that.

MR. KIDANI: Your Honor, can I have the Clerk give to the witness exhibit M30, please?

(Exhibit handed to the witness)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME II OF VII VOLUMES

PAGES 157-306

DATE: May 23, 1986

terminals?

A Yes, they own forklifts.

Q But the forklifts that opened and closed the barge house doors, who owned those forklifts?

A In Honolulu?

Q Yes.

A Castle and Cooke.

Q So the forklifts used to open and close the barge house doors, they belonged to Castle and Cooke.

A Yes.

Q And were you given permission to drive them when you were in that nature?

A No.

Q Marlin, who was responsible for opening and closing the barge house doors which are indicated in plaintiff's exhibit number 1?

A Castle and Cooke Terminals.

Q When you say it was Castle and Cooke,

will you explain how it evolved?

A It's a stevedoring operation to open and uncover and cover hatches according to their contract.

Q Now, this was going on even before you arrived in Honolulu, is that right?

A Yes.

Q Now, when the forklift was used, and I think there is

testimony, to open up the barge house doors, you testified that someone would be manning the winches, is that right?

A Yes.

Q And you said that someone would be manning the winches to prevent jamming.

A Yes.

Q And you mentioned that on two occasions there had been a jam, is that right?

A That's correct.

Q Now, you were there, correct me if I'm wrong, before Donald Kong's accident. You were there working at Hawaiian Marine Lines for at least four years, is that correct?

A In Honolulu?

Q In Honolulu.

A No, that's not correct.

Q How about three years?

A Before Donald's accident?

Q Yes.

A Probably two years.

Q So am I correct that, during the two years that you were there before Donald Kong's accident, that there had been only two jams, two occasions?

A That's correct.

Q And we're taking into consideration the number of voyages that each time it came to Honolulu. How many times would it

A That's correct.

Q Now, there has been some testimony, if I may move on to another subject matter, about your inspection of the turnbuckles and the cable system. Specifically with respect to this door, you mentioned the word visual. I mean did you go on top of the barge house doors every time it came in and did you inspect it real close? Is that what you meant?

A No. I didn't climb up there to inspect it. I took a visual inspection from the deck itself.

Q Standing more than 15 feet away from it?

A Sixteen feet high and about eight feet back.

Q But you would generally look to see if it was attached, that it was not for any reason unsecured, is that right?

A That's correct. As long as it was working, it was fine.

Q Did you have any reason during the time you were there working for Hawaiian Marine Lines have any reason to inspect or to touch any of the turnbuckles on the door of the Oahu for any reason?

A No, I did not.

MR. ESTES: Objection. That's a compound question, if he had an opportunity to inspect or touch.

MR. JIM ON: Okay. I'll use inspect.

MR. ESTES: That has been asked and answered.

THE COURT: No. He may answer.

Q Please answer the question.

A Could you repeat it again?

Q I'll put it in the phrase that I had it. Did you have any reason to inspect

or touch the turnbuckles on the barge Oahu, and I'm talking about the one on top of those batten boards, the ones just above the barge doors? Did you have any reason to inspect or touch them prior to Donald Kong's accident?

A No.

Q Did you have any reason to adjust them?

A No.

Q I want you to explain to the Court about this electric winch system, the recommendation that you had made. Is that correct that you asked for an electric winch on the Oahu?

A Yes. I wrote them a letter to that effect.

Q And what were you specifically told as to why an electric winch would not be installed?

A They told me that the barge was going out of service and they were going to

cut off the house and make it a flat deck container.

Q Which is actually what happened in 1982 to this barge house, is that correct?

A I don't know what year. Yeah, it was 1982.

MR. JIM ON: Your Honor, may I check my list over?

May I ask for a one- or two-minute recess?

THE COURT. Well, let's take a 15-minute recess.

A Charles Onishi.

Q And what is the function of Charles Onishi?

A His actual title is safety and training administrator.

Q What is involved in your job as supervisor to Charles Onishi?

A Approving and overall direction in his duties.

Q Do you actually go out and observe the safety training that goes on by Mr. Onishi?

A From time to time.

Q Isn't it true that, before Donald Kong's accident, there was a safety cage to be used by the forklift?

A You're referring to a personnel carrier?

Q Yes.

A Yes.

Q And how long has Castle and Cooke Terminals had that personnel carrier to be used by the forklift?

A I'm not sure. I was not with Castle and Cooke Terminals much prior to that.

Q Okay. But you are certain that there was one available at the dock to be used by the forklift, is that true?

A I can't be specific as to whether it

was available that year, if that's what you're asking.

Q Castle and Cooke had personnel carriers to be used by forklifts?

A I believe so, yes.

Q And when is it determined that those types of personnel carriers are to be used by the forklifts?

A Normally it would be used for an individual who had to be raised up to a certain height to do some kind of work safely.

Q As a supervisor of the safety administrator, what height would you require your men to use this personnel carrier on a forklift?

A That would depend, but it could also depend on the availability of ladders or the like. Normally I would say anything over 12-15 feet.

Q Anything over 12 to 15 feet.

A Yes.

Q What about safety belts, were those available for Castle and Cooke longshoremen?

A Yes.

Q When are they required to be used by Castle and Cooke Terminals and now Hawaii Stevedores? At what height do you require your personnel to use safety belts?

A They are normally used on top of containers.

Q Any time else?

A I don't think I can answer your question for any other time.

Q Would Mr. Onish have that information?

A Yes.

Q Also, as a safety administrator for Castle and Cooke

affect the way the doors open or close together.

MR. ESTES: Let me split it up then.

THE COURT: That was your first question.

MR. ESTES: That was the first part of the question.

THE COURT: Restate your question.

MR. ESTES: I'll be glad to.

Q Mr. Blundell, if you assumed that the operators of that bargehouse door are using only the manual winch system to open and close the doors, isn't it true that the absence of a lock wire on either or both of the port turnbuckles may create serviceability problems, if you will, in terms of or operational problems, in terms of getting the doors to close together appropriately or

properly but would not in effect create any safety problem?

MR. JIM-ON: I still have a problem because the questions are couched in terms of possibility, and, secondly, it is compound.

THE COURT: You may answer.

A The basic need for the lock wire here is not from the primary point of view of safety. The battening up of the turnbuckles will, as you say, only cause problems particularly in terms of operation of not getting the doors to close exactly where you want them to be. That's one reason for the turnbuckle, yes, sir.

Q Do you have any opinion as to whether or not it's appro-

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME III OF VII VOLUMES

PAGES 307-440

DATE: May 28, 1986

A When I was employed with Castle and Cooke Terminals, I was first employed as a stevedore, which is a laborer; but, besides being a laborer, I was given subtitles like submachine title, subwinchman, I was a crane operator, alternate log clerk, and acting supervisor.

Q When were you promoted to supervisor with Castle and Cooke?

A I was promoted to operating supervisor April 1980.

Q At the time that you became supervisor, was Mr. Takeo Tanaka the superintendent that was right above you?

A Yes, sir.

Q Mr. Kong, could you tell us your recollection of how the accident happened on December 24, 1980?

A On the night of the accident, we were in the process of loading back the

barges, and, when we got through loading back the barges, we began to close the doors; so we closed the first door, which is the port door, and then we went over to close the starboard door. While in the process of closing the starboard door, somehow it got jammed.

When it got jammed, we looked around to see if there was any HML representative around the area; and, as I recall, I, myself personally, couldn't find anyone. I came back to the door. I climbed up the door on the ladder-like door, and, when I got to the top, I took ahold with one hand on the top cable and with the other hand held on to the other cable.

the forklift to the door through this cable, is that correct? You answered: Yes, sir. Then I asked you: And they

were trying to pull it closed. You answered: That's correct, sir.

Is that true that they were trying to pull the starboard door closed just before you got injured?

A That is right, sir.

THE COURT: Let me interrupt. Do these doors slide back and forth? It didn't open like this?

THE WITNESS: They slide. They slide like that and slide back like that.

THE COURT: Okay. Thank you.

Q Do you recall... . Let me go back. You already testified that the port door, the port door had already been closed, is that correct?

A That is correct, sir.

Q And they were in the process of closing the starboard door pulling the door closed, is that correct?

A That is correct, sir.

Q Do you recall where the hookup was

made for the forklift on the starboard door, where they would attach the cable to?

A No, sir.

Q You don't recall what area of the door.

A No, sir.

Q Do you recall how long the cable was?

A No, sir.

grabbed. Okay. Let me ask you if this statement is true that you made when I asked you at the top of page 15: Do you recall which cable you grabbed; whether or not it is the one with the turnbuckle or the one below the turnbuckle? You answered: I believe at this time I don't know what hand, right or left hand, but I know that I, with one hand, took ahold of the top cable, which is attached to the turnbuckle, that is, attached to the

anchor plate, while the other hand I tried to loosen the cable that I assumed was stuck. Question: So you had both hands on one cable. Answer: Well, at the time, like I say, you got a double cable running, but, like I say, I don't know what hand. But when I was just... . I know the thing happened so fast. Like I say, I had one hand on this cable, another hand on this cable trying to work the thing loose. All I know is the thing just came right off, yeah. I know that the cable that I was trying to loosen up didn't break loose, but the one that I was holding that was attached to the anchor plate, that's the one that came off, but what hand I had on what cable I don't know.

- Is that a true statement, Mr. Kong?

A If I said it in the deposition like it is, it's probably what happened, but, right now, as I can recollect, I don't

remember.

Q Your best recollection is that you were trying to loosen the cable when you were at the top of the starboard door just

to you to be used when you're working at heights, when you have to work above a certain height level?

A There are safety belts that we have but I don't recall if there was any available at that particular pier during the operation that night.

Q What criteria or what heights do you usually have your men wear safety belts?

A I would say roughly about two containers high which is roughly about 16 to 17 feet.

Q How high was the top of this cargo door? Do you recall?

A The height of the door, I don't know the exact height but I would say in the

vicinity of 13 to 16 feet.

Q And where the cables are at the very top, do you recall about how high that was?

A Can you show me on the diagram where you're referring to?

Q The cable that you pointed to that you grabbed, the highest cable, how high is that?

A Well, like I say, I don't know the real height, so I estimate it between 13 to 16 feet.

Q Okay. Why didn't you get a safety belt on the night of the accident to use? Any reason?

A No. Like I said earlier, when I first started there as a stevedore, the practice was to climb up the doors without any safety belt to unloosen the locks so that we can open the doors, and that was the practice and we were taught that way

BEST AVAIL

Q Were you working that night?

A I don't remember, sir.

Q Do you remember whether or not... . Okay. Let me go back. Do you remember when you heard Tanaka give the order to close the door if he also ordered anybody to take up the slack on the winch wheel? Let me rephrase it. Let me go back. Do you know what the winch wheels are on the barge doors?

A I see it there.

Q Do you know what they are for?

A Not really, sir.

Q You never used the winch system?

A No, sir.

Q On the night of the accident, do you recall if anybody was on the winch system?

A No one was there, as I recall, sir.

Q No one was at the winch system.

BLE COPY

A No, sir.

Q No one was taking up the slack at the time... .

MR. NAGLE: Objection. Asked and answered. He said nobody was there.

THE COURT. That's a different question.

Q No one was at that area taking up the slack of the door system when the forklift was pulling the door closed?

A No, sir.

Q Do you recall if Mr. Tanaka gave any instructions to anyone in the area when he was ordering the doors to be closed to get someone over there to pick up the slack?

A No, sir.

Q Did you ever see on this occasion or any other occasion Castle and Cooke

employees trying to take up the slack by hand without using the winch system?

A No, sir.

Q Who was driving the forklift on the night of the accident?

A I believe it was Joe Flores.

Q Who was in charge of the gang on the barge Oahu before you came over that morning?

A I don't know who was in charge of that gang.

Q There's a George... . Is one of your foremen named George at the time of the accident?

THE COURT: Is one of the what?

MR. KIDANI: Foremen.

Q Wasn't your counterpart, one of the foremen, named George, one of the supervisors? Do you recall? George Chock? Do you know who George Chock is?

A Yes, sir.

Q Do you remember if he was working on

the night of the accident?

A No, sir.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME IV OF VII VOLUMES

PAGES 441-607

DATE: May 29, 1986

representative, but isn't it true that in your deposition that you did not indicate you went to go look for a representative but indicated to see if you could solve the problem first?

A What was that, sir?

Q Isn't it true that you in fact didn't go look for an HML representative before you went up the barge house door because you wanted to see if you could resolve the problem first?

A If I said that, that's what I probably said at the deposition.

Q Mr. Kong, I want you to turn to volume 3, page 42, of your deposition, and I want to ask you if this is a true statement or not. Line 13, page 42, volume 3.

A What page is that, sir?

Q Page 42.

A Page 42.

Q Yes, line 13. Isn't it true you testified when we asked you the question "Before you went up on the door, did you tell anyone that maybe the vessel owner should get someone down to fix the doors or did you feel it was your responsibility to do it as opposed to the vessel owner? Do you recall?" that you answered "Well, when you say that, I feel it was my job as a supervisor to go and find out what the problem is, and, if it is only something minor and we can solve it, we are going to solve it. But, if we cannot solve the problem,

then we will notify the other party. Question: So, in other words, at the time just before you fell off the door, you were just investigating to see if it was a minor problem or not. Answer: Well, yeah, I feel it was a minor problem

and just, like I say, I was trying to break the cable loose, but just by starting to do that that's when the cable came off.

Isn't that true?

A Well, if that's what I said, that's what I said.

Q And isn't it true you didn't look for an HML representative before you went up on the barge house doors because you felt it was a minor problem?

A Well, maybe at that time I gave the deposition, you know, I don't recall everything; but sometimes things come back that you recall after that, which I should have corrected this deposition at that time when I read it.

Q But isn't it true that at the time you gave us this deposition you testified that you did not look for an HML representative?

A I don't remember.

Q Is this a true statement that you gave in your deposition?

A At the time that I gave the deposition.

Q That that is a true statement? Is this a true statement that I read or not?

A I believe so, s:r.

Q Is that a yes?

A Yes, sir.

MR. KIDANI: Thank you, Mr. Kong. I have no further questions.

THE COURT: Mr. Estes.

MR. ESTES: Thank you, your Honor. Good morning, Mr. Kong.

THE WITNESS: Good morning, sir.

BY MR. ESTES:

Q Mr. Kong, I just want to briefly go over a few of the things that you have already testified to so that I get it clear in my mind.

You indicated that just before your accident that you recall that the forklift operator had closed the port door or the door which is on the left side of this exhibit 1, the drawing, is that right?

A That is correct.

Q Now, were you there when the forklift operator was hooked up to that door and pulling it closed?

A Yes, sir.

Q Okay. Now, as I understand it, after the forklift operator got the port door closed, the left-hand door on this picture closed, he unhooked the cable from that door and then hooked it on the starboard door in an attempt to close the starboard door, is that correct?

A That is correct, sir.

Q Okay. And I believe you testified that, after the forklift operator hooked up the cable to the starboard door, he was able to move it maybe a couple of feet, I believe you said.

A That is correct, sir.

Q Until it got stuck.

A That is correct, sir.

Q So this picture then does not really represent the position of the barge doors at the time of your accident, does it?

A I don't think it's an exact drawing but it is similar to the doors on that barge.

Q I know that this just represents the doors closed, but you said at the time that you went up to inspect the cables and so forth that the doors were stuck; that the right door had only been closed a couple of feet, is that right?

A That is correct, sir.

Q So this picture here in exhibit 1, plaintiff's exhibit 1, which shows the barge doors closed together, does not show how the doors were at the time that you had your accident, is that right?

A That is correct, sir.

THE COURT: Mr. Estes, let me interrupt one second. What is drawn in black there that is labeled manhole? Is that just one door?

THE WITNESS: Can I answer that, your Honor. That's

yourself.

Q You never heard that before on any of your operations with Castle and Cooke Terminals.

A No, sir.

Q Now, Mr. Kong, this was gone into a little bit yesterday but I'd like to get into it briefly, if I could. Mr. Kidani,

when he was cross-examining you, showed you a portion of your deposition transcript, which I believe is contained in volume 3, pages 21 to 22, which dealt with the question of which of the two cables that we're talking about that are on top of the starboard door, which of those was loose or which was tight. Do you remember that discussion yesterday

A To the best of my recollection, I believe that both of these two cables were tight.

Q Do you remember Mr. Kidani pointing out to you in your deposition your testimony to the effect that the top cable was loose or was slacked and that the bottom cable was tight? Do you remember he pointed that out to you that you said that in your deposition?

A But, like I say... .

Q Do you remember him pointing that out? Would you like to see the

deposition transcript again?

THE COURT: All he is asking you is do you remember that Mr. Kidani pointed that out to you yesterday. Do you recall? He asked you yesterday if you said in the deposition

Q You say they were assigned in operations. How were they trained?

A By Marlin Pulliam and myself in that particular area of endeavor.

Q Okay. And how long did the training take place?

A Oh, it was about a six-month training period, sort of on-the-job training.

Q I assume when you mention six months, this preceded the accident, is that correct?

A That is correct, yes.

Q Now, let's head right for the subject matter in question. On or about December

or in the year 1980, could you describe the contractual relationship that Hawaiian Marine Lines had with Castle and Cooke insofar as what Castle and Cooke was responsible to do?

A Well, it was a normal contractor relationship between the vessel owner, who was in the business of hauling freight, and the stevedore contractor; and primarily they were responsible for providing the personnel and the cargo handling equipment which would get the freight off the vessel and subsequently back on the vessel, and it's basically their responsibility to perform that function for us.

Q Was there anything designated as far as responsibility to specifically open and close the barge house doors, say, for example, on the Oahu?

A That was one of the responsibilities Castle and Cooke had under that contractual arrangement, yes.

Q Okay. Now, this contractual arrangement that you specified or alluded to, is this something that was written or oral?

A Well, it was a written contract that was executed by Pacific Island Navigation and I believe, if memory serves me correctly, that it was carried over to Hawaiian Marine Lines on the basis of sort of historical practice, the same contract in effect. It was the same people and the same equipment and the same operation.

THE COURT: I think he's asking was it in writing that they open and close the doors.

THE WITNESS: Yes, it was, sir.

THE COURT: It was in the

contract.

THE WITNESS: Yes, sir, it was.

Q I think that needs further explanation.

MR. JIM ON: I wonder, your Honor, at this time if I could have exhibit EEEE.

(Exhibit handed to Mr. Jim On)

Q Mr. Stiger, I have handed you what has been marked as exhibit EEEE. Can you explain what this exhibit is, please?

A Well, this is a copy of the contract between Castle and
Cooke and Pacific Inland Navigation, the former company of
Hawaiian Marine Lines

Q Now, Pacific Inland Navigation Company, that's PAC that

ing here and manually crank that door open and close. I think what developed

is they simply started to use the forklift as a power so the men didn't have to physically exert themselves to open and close the doors.

Q By the way, did Hawaiian Marine Lines own any forklifts at the Honolulu port?

A No. We didn't have any stevedoring equipment.

Q Now, there has already been testimony in this particular case that on December 22, 1980, the barge Oahu had already docked in Honolulu. Do your records indicate this?

A Yes, they do.

Q Do you know where Marlin Pulliam was that day or that time?

A Well, a review of the records indicate that he was on vacation during that time period.

Q And, in his absence, during the day shift, who would take over?

A That responsibility then fell on my

shoulders.

Q In this particular case, do you know from your records as to the time the barge Oahu on December 22, 1980, docked?

A A review of the records would indicate that it docked at approximately 12:00 noon.

Q What would you have done or what did you do or what was your normal practice when the barge came in?

A Well, it was sort of a routine. We would go ahead and

in and they unload it and load it and send it back to, you know, the West Coast.

Q During those two voyages... . Well, let me ask you this question. November-December of 1980, were you working for Hawaiian Marine Lines?

A Yes.

Q You were not on vacation or anything like that.

A No, I was not.

Q So were you there when the first voyage or when the November, the time that the barge came in, during the November voyage?

A Yes, I was working.

Q During those two voyages that you said you were there, did you ever adjust, fix or touch the turnbuckles that are depicted on the top of the cargo house doors on exhibit number 1, any of the turnbuckles on either the starboard or the port?

A No, not to my recollection.

Q On or around December of 1980 did you have any contracts or understandings with outside repair organizations that did repairs and things on the barge itself?

A Well, we didn't have a specific contract, but, whenever there was

something wrong with the tug or the barge, we would call up Dillingham Shipyard, PAC Marine, WISCO, whoever had people available to do repairs and they would come down and do repairs for us.

ing and there was no one in attendance because we didn't have any help, you know, Marlin was at home or I was at home, whoever the responsible individual is, he had those phone numbers and he would then contact us and say, hey, the generator quit, there's no lights on the barge, come down and fix it.

Q Were there instances in which you were in fact contacted in 1980 by Takeo Tanaka?

A I can't specifically remember instances.

Q Were there any instances before 1980?

A Oh, yes, abundant instances.

Q Do you know if Mr. Tanaka had your number available?

A Oh, yes. It was a standard operating procedure or routine.

Q Were the opening and the closing of the barge house doors on the barge Oahu, were they always supervised by yourself?

A No. I might be down on the tugboat talking to the skipper about getting ready to sail, do this or that, or I might be at the dock office, or Marlin or whoever was the responsible individual. Yeah, they would open and close the doors without a Hawaiian Marine Lines representative on the site.

Q Let me ask you this. On December 1980 do you know if Castle and Cooke personnel had ladders, equipment such as ladders that could reach the height of the barge house door as depicted on exhibit number 1?

A Well, yeah. We always had deck loads

of cargo and they would, as a matter of routine, bring down ladders and personnel

lifts to facilitate putting people on the deck load to remove lashings and also to hook up cargo that had to come off with a crane.

Q Well, what kind of cargo are you talking about?

A There would be glued lam beams, re-bar, pilings, office trailers, I mean anything that we would call top stow cargo, which would be riding on top of the deck load.

Q And what would they be on top of?

A Well, generally on top of containers or lumber, primarily lumber, green lumber.

Q And how high would they be?

A Anywhere from six to twenty feet. The average was about twenty feet.

Q What would the Castle and Cooke employees use besides ladders to ascend those kinds of cargo?

A They had a regular personnel carrier which was, you know, like a manlift. It was a box and the guys would get in there with their gear and they would ride up on the crane or they go up on the forklift to get on top of the deck load.

Q Now, this deck load that you mentioned, and you mentioned lumber, do you know of anyone, do you know if that type of load was stowed on the barge Oahu when it came in on December 22nd.

A Yes. A review of the cargo plan would indicate that we had a deck load of lumber and the top cargo stowed on top of

Q As far as the maintenance, inspection, repair of the barge and its equipment, that was the responsibility of

Marlin Pulliam, correct?

A Yes, it was.

Q Mr. Pulliam testified in his deposition, Mr. Stiger, that as operations manager, he had a custom and practice of inspecting the equipment on the barge Oahu every time it came in to Honolulu. Was that your observation and understanding?

A Well, that's what I used to do, so, you know, when he came to Honolulu in that position, he simply carried on the duties that I had previously performed, yes.

Q And he also said that, as part of his inspection, he would inspect the cables, the bolts, the turnbuckles, the rigging system on the cargo doors. Did you ever do that when you were with HML?

A I believe that I did that on a sort of routine basis. I don't recall specifically but it was sort of a habit

thing that one did.

Q On the voyage of the barge Oahu when it arrived in Hawaii December 22nd, was it...

A Yes.

Q ...at that time Marlin Pulliam was on vacation, is that correct?

A Yes. The records indicate that he was on vacation.

Q And I think he testified that he was in Portland at that

A No.

Q Would you know what the inspection would require, what this particular type of inspection would require?

A Well, I performed Mr. Pulliam's job for a period of seven years prior to his coming to Hawaii.

Q What would you look for as a routine inspection of the riggings on the cargo

door?

A Well, basically all that an individual would look for is to make sure that the cables were not out of the pulleys and, you know, everything was intact and they were taut. They would have to be that way in order to have the barge house doors closed when it departed Portland.

Q Would you also check to make sure that the cable wires are under proper tension?

A They would have to be under proper tension, you know, to get the door closed in Portland.

Q Would you check also that the eyebolts are properly secured to the body of the turnbuckle?

A I don't remember specifically having to do that, Walter. It was, you know, sort of a routine item that you eyeball everything and you open the door after

you have taken the bolts off.

Q Before Mr. Pulliam came to work for Hawaiian Marine Lines, my understanding is that you were... . What was your position before Mr. Pulliam came?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME V OF VII VOLUMES

PAGES 608-733

DATE: May 30, 1986

barge?

A Yes, to oversee the total operations of loading and discharging.

Q So during the course of the evening you were going between two barges, is that right?

A Yes.

Q Do you know if you saw Mr. Kong earlier that night?

A Yes. He was working on the barge Oahu, the house barge.

Q Do you know if he was working on the other barge?

A I don't believe so. I think he was assigned to the barge Oahu.

Q Okay. Do you remember offhand if he was assigned or not assigned to the Oahu?

A Not totally.

Q Well, in any event, you saw Mr. Kong earlier that night on the barge Oahu. Did you talk to him?

A Yes, an occasional hi and how are things going and that sort of thing.

Q Shortly before Mr. Kong's accident, where were you on the barge Oahu?

A I was walking towards the aft section of the barge and just primarily checking some chains and containers that were loaded at the time, turning towards the doors.

Q Mr. Yuen, the Clerk has handed you exhibit DDD. Can you tell the Court what that is?

A This is a sketch of the barge Oahu.

Q And is that the loading plan that you were to follow?

A It looks like it, yes.

Q Can you show the Court where you were shortly before the accident on that loading plan?

A I was walking towards the back

section of the barge.

Q And where were you just before you came to the aft section of the barge?

A Just in the area where the doors were, walking towards the area of the door in that area on the barge.

Q Now, just before you arrived toward that aft section, did anybody yell out to you or was anybody to your knowledge looking for you?

A No, not that I recall.

Q What do you recall next as you were going to the aft section of the barge?

A I heard a lot of commotion, I guess, and just hearing a lot of commotion and trying to find out what was going on. I slightly turned and someone was going up the batten boards of the house barge, and the next thing I know someone is coming down, falling down.

Q Did you actually see Mr. Kong at the top of the bargehouse doors?

A Yes.

Q What do you remember seeing as you were going towards

the aft section of the barge?

A First of all, I just slightly turned and all I seen was someone yanking on the cable, I guess to free the cable that was stuck; and the next thing I seen, the thing happening so fast, Mr. Kong falling.

Q How much time elapsed from the time you arrived and you saw him up there until the time he fell?

A Probably seconds. I can't recall how fast. Everything happened so fast. Like I said, it was drizzling and it was still dark and a lot of noise going on.

Q Could you see everything clearly at the top of the bargehouse? What was the lighting condition?

A You can't really see clearly because the lights are dedicated on the deck of the barge. You can see probably shadows. I didn't identify Kong up there until the man fell on the deck hitting the forklift and then falling on the deck and at that point it was Mr. Kong.

Q What do you recall happening next?

A Summoning someone to call for an ambulance and getting Mr. Kong attended, taking care. Everything was happening so fast. Finally an ambulance came up and rendering first aid to Kong and taking him away.

Q What occurred next?

A Well, I wanted to secure the ship and get those doors closed so everybody could go home. Everyone, I guess, was

A No. It screwed back very easily.

Q Was there any cable cut or anything

of that nature?

A No.

THE COURT: Did you say cut?

MR. KIDANI: Yes.

A No.

Q Mr. Yuen, did you ever talk to Mr. Tanaka to close the bargehouse doors?

A I don't recall. I honestly don't recall.

Q Did you order the doors to be closed before Kong was hurt?

A No, I don't order the doors. They normally tell us when all the cargo is in and they will go ahead and close the doors themselves.

Q Who is they?

A I'm sorry. The stevedores, the longshoremen.

Q And in this case who was that?

A Castle and Cooke Corporation.

Q What is your understanding as to the closing, of the doors?

A Well, my understanding is that, when they got all the cargo, they shut the doors and let me know that it is closed and that they are ready to secure the ship.

Q What is your understanding as to whose responsibility it is?

A It would be the supervisor's who is assigned to that

of the accident?

A Away from the doors.

Q And was there a forklift in front of the doors at the time of the accident?

A At the time of the accident, yes.

Q Was the forklift being used to close the doors at the time of the accident?

A Yes.

Q And how far were you away from the forklift at the time you say you turned and saw all of these events?

A It's kind of hard to answer that question, sir. I don't know how far. It seemed to me like quite a distance in the dark. At the time there were containers loaded on the aft section also; so whether it would be ten feet or fifteen feet or twenty feet, I'm not positive.

Q Can you show the Court in the courtroom today approximately how far it would be from you to a point in the court?

A Well, where Mr. Kong is seated now, I guess it would be probably where I am, if not a little further.

MR. NAGLE: Your Honor, I believe Mr. Estes walked off this space yesterday. We're talking about approximately twenty-five to thirty feet.

A That's my best guess. That was five years ago.

Q Did you stay in the same position the whole time you were watching the person

going up the batten boards to the time

of the fall?

A No. I was moving around.

Q Were you moving backwards or forwards or where?

A It could be in all directions, sir, forward, backward, checking the turnbuckle, checking the containers, the cones that they are secured.

Q At what point were you checking the turnbuckles?

A Prior to the accident during the beginning of the shift, any time.

THE COURT: You're not talking about the turnbuckles on the door.

THE WITNESS: Turnbuckles that... .

THE COURT: That hold the load down.

THE WITNESS: Yes, holding the

load down, from the deck to the chain to the top of the containers.

Q Were you referring at all to the turnbuckles that were on top of the doors of the barge Oahu?

A No.

Q What was it that first directed your attention to the doors as you were walking backwards?

A Well, there were noises, commotion. It seemed to me like there was some commotion. I seen the shadows skimming up the boards, and the next thing I know someone yanking on the cable and someone falling.

Q Did you see any sort of loop or snag in the cable at that

time?

A Yes.

Q With reference to exhibit number 1,

could you show the Court where this snag or loop in the cable was when you saw it just prior to the accident?

A My best recollection is that the loop was here in this section here.

MR. NAGLE: Okay. May the record reflect that Mr. Yuen is referring to the port side of the port door.

Q And I ask you, Mr. Yuen, with the aid of this red marker, if you would put in on the port door where the loop was.

(Witness complied)

MR. NAGLE: And the record should reflect that Mr. Yuen has done so. Thank you, Mr. Yuen. You can return to your seat.

Q And that loop was visible from where you were twenty-five to thirty feet away.

A Yes.

Q Did you see any other problems with the cable?

A Not to my knowledge, sir.

Q Is it your understanding that HML has control of the equipment on the barges that the stevedores do not run?

A Have control of the equipment? That's all part of the barge.

Q And HML is the company that inspects the equipment on

Q I believe you previously said that you saw the person who went to the top of the doors to try and unloosen the cable in some such fashion, right?

A Yes.

Q And what you saw up there were shadows, right?

A Yes.

Q You didn't actually see Mr. Kong holding on to some particular item, did you?

A Well, I seen a person up there with

two hands yanking on the cables to free them.

Q Did you ever testify before that you weren't certain that that's what you saw?

A I did testify that that's what I saw, I guess.

Q You guess?

A I guess.

MR. NAGLE: If I may approach the witness, your Honor.

Q Mr. Yuen, I show you a copy of your deposition. This was taken on May 19, 1986. I'd like to refer you to lines 6 through 9 on page 45, if you will read those, please.

(Witness examines deposition)

Q At that time, did you testify to the following question: So you saw two hands on the same cable. Answer: Yeah, I believe, I thought I saw two hands pulling the cable because he tried

pulling it loose and he... . I'm not certain.

Kidani's direct examination, we're entitled to go into this a little bit further.

THE COURT: Go ahead.

A Like I said, things were going on. There was a commotion. I'm not sure if I did see, well, the forklift trying to close the doors at the time.

Q From the time that you first glanced back at the door until the time Mr. Kong reached the top of the door, what time frame are you talking about?

A Everything happened so fast. It could be a matter of seconds or a minute.

Q During that period of time, did you see anyone else going up the port door at any time after you turned around to glance after hearing the commotion?

A I don't recall.

Q During the period of time that Mr. Kong is going up the door and you're watching him, did you at any time say: Wait, I'll do it; I'll go up.

A Really there wasn't much time to do anything. Everything moved so fast. It was just at an instant someone pulling on the cable and someone falling. I had no time to really see what he was actually doing or how long he was up there.

Q Did you at any time object? From the time you first saw the person starting to climb the batten doors, did you object to the person going up?

Q Mr. Yuen, are you aware of this turnbuckle above the door ever separating before?

A No.

Q In respect to the... . You were

asked about the dogging of the doors, some of the doors. In respect to the dogs, what dogs... . Well, let me back up. How many times have you done that?

A I don't know how many times I've done that.

Q A few times.

A Yes, a few times I would say. It's not a normal thing that I would do.

Q Would you be watching other people do it or would you actually do it?

A No. I would be watching other people do it, the stevedores.

Q So that your testimony is clear, when you say you dogged, you're watching the stevedores actually do the manual work.

A Yes.

Q What is your understanding as to the responsibility of dogging? Whose job is that?

A That would be the stevedores.

Q In respect to the night of the

accident, just before the accident, you're positive you were aboard the vessel Oahu.

A Yes. I was on the barge Oahu.

Q And you're positive that you did see somebody yanking

distributed or disseminated around the time of the accident, this was produced; so am I correct in assuming that these rules were given to the operation supervisors in draft form around the time of the accident?

A I'm not too sure whether it was at the time of the accident.

Q Was it at or near the time of the accident, if you don't know the specific date?

MR. NAGLE: Objection, your Honor. He has already testified he is unsure at what point in time these were

given to the people.

THE COURT: You're unsure whether it was given before or after Mr. Kong's accident?

THE WITNESS: I'm more inclined to believe it was after the accident. That's about the best, but I do remember why it was prepared in this manner. That was primarily for the benefit of new employees coming to the company.

Q Is it your testimony then that it was prepared only after the accident in this case?

A As best as I can recall. I would have to go back and check the file.

Q Let me ask you this then, Mr. Onishi. With respect to ladders, ascending areas of heights above six feet or seven feet, were there any discussions with the operation supervisors at or near the time as to what the requirements were of Castle

and Cooke as to the manner of ascending heights?

MR. NAGLE: Same objection as previously noted, your Honor. We're getting into the matters of ladders.

THE COURT: Overruled.

A If there was, I just can't recall whether I had discussed with them about, if you're going over a certain height, for example, over eight feet, use a ladder or something.

Q Isn't it true that, at or near the time of the accident, the operation supervisors were informed, instructed or otherwise told that to ascend heights above certain levels that ladders were required to be used and to be secured?

MR. NAGLE: Objection. No foundation.

THE COURT: He may answer, if he

knows.

A If they were informed, I can't remember if it was done by me or somebody else.

Q When you say me or somebody else, are you saying they were never informed by you but by someone else in this case around that time?

THE COURT: He said if they were informed by somebody else. He doesn't know if they were or not.

Q Is it my understanding that, at or near the time of the accident, Castle and Cooke did have personnel carriers?

A Yes, they do.

Q And that personnel carrier was fitted together with the forklift to permit an individual to rise or go up to a certain

height, is that correct?

A I believe that's the usual manner in which the carriers are used. Of course,

they are also used by a crane, in other words, attaching a line from the crane to the carrier and people sitting in the carrier.

Q Now, in this particular case, there were what we call are barge house doors. There has been previous testimony that they had a height of about 12 or more feet. Is it my understanding that at or near the time of the accident that you had ladders, Castle and Cooke personnel had ladders, that could reach those particular heights?

A I'm sure there were.

Q And it is my understanding that these particular ladders were located within or near the wharf area.

A That, I don't know.

Q There were ladders and there were personnel carriers available at least as part of the equipment of Castle and Cooke around the time of the accident, is

that correct?

A That's correct.

Q With respect to the personnel carriers, am I correct in assuming that the operation supervisors or individuals were instructed as to how to use these personnel carriers?

A Yes. I believe they are familiar with them.

Q They are familiar because you must know how to hook them up and how to get into the cage, isn't that correct?

I'll first ask him whether or not he was aware of it.

THE COURT: Go ahead. Do you remember that meeting/

THE WITNESS: I was not in the meeting.

Q You were not in that particular meeting?

A No.

Q As a safety and training administrator at that time, my question to you, sir, is, based on your knowledge and experience in this case, if an employee, and you have specifically observed or were aware of an employee climbing the batten boards to the barge house, if that was done and you were aware of it, could you tell me what action you would have taken?

MR. NAGLE: May I note an objection, your Honor. Number one, I don't think we have an appropriate foundation for Mr. Onishi as far as him giving an expert opinion as far as safety in this matter. He may be a safety administrator but I think the Court can see his safety background and training was woefully inadequate for him to render an opinion in that area. And also I believe counsel is calling for a

conclusion as to the issue in this case.

THE COURT: He may answer. You were asked, Mr. Onishi, what you would have done if you had seen someone climbing up the batten board doors.

THE WITNESS: Well, obviously, if he was going up a considerable height there, I would have put a stop to it.

Q What do you mean by considerable height?

A Well, according to the regulations, any time you go up to eight feet, you have to have a safety belt for one thing; another situation there is use a ladder.

Q And if a ladder wasn't available.

A Well, you just have to find some other means of doing it other than climbing up the door.

Q In this particular case, prior to the accident, did you have any incidents or

investigate any incidents in which you told employees or supervisors that was not using the ladder or was ascending heights without the use of ladder or without the use of personnel carrier, did you have any cause to investigate that sort of situation?

A As best as I can recall, no.

Q When a barge such as the Oahu came in, is it my understanding that you generally inspect the barge or the vessel that came in?

A Yes. I try to make it a point to go and check over and inspect the vessel, yes.

Q And is it my understanding that you would be checking for the access area and generally around the area where the stevedores would be working, is that right?

A I would try to make a walk-through of the vessel, yes.

Q And, if you weren't there, would Brian Scholtes do it or someone else in your stead?

A Yes. Brian would probably try to do it.

industry, I believe we started back doing work with them in 1979, the early part of 1979 is the best I can remember.

Q In respect to the barge Oahu, on or about October-November-December of 1980, during that time period before December 24, 1980, did you know of any incident where the turnbuckle disengaged from any part of that cabling system on the barge Oahu before Mr. Kong's accident?

A No.

Q With respect to that cabling system, is there a term that would be used for that cable? Is there a term like a safety line? Is there a term that would

be assigned to that cable?

A It would be an operating cable or running cable.

Q What do you mean by operating cable?

A Well, it would be used to open the door, to cause the door to open or close.

Q And it is also referred to as a running cable?

A Yes.

Q Are there other types of cabling system on the barge?

A Yes. We have other types of cable systems on the barge. Some of the safety rails or hand rails around the perimeter of the house and some of the fence stanchions have safety rails, cable safety rails.

Q Are there different requirements... . Let me rephrase that. Do you do anything different in inspecting and operating a running cable as opposed to a safety rail cable?

have been opened for cargo discharge. Upon leaving Hawaii, the doors would have been closed again. That's three times.

Upon arrival at Portland, the doors would have been opened again, cargo loaded. Upon departing, the doors would have been closed again. That would be five times. Upon arrival in Honolulu, again the doors would be opened one more time. That would be six times.

Q So, during the process of closing, after the 6th opening or the use of that cabling system, is that true?

A I didn't hear the question.

Q That would be about the sixth time.

A About the sixth time, yes.

Q Can you explain to the Judge why it is not on a regular schedule?

MR. KIDANI: I withdraw that. Let me ask another question.

Q Is it that you don't do any inspection at all of that cabling system during 1980?

A Was there any inspection of it?

Q Yes.

A Apparently there was an inspection of the cable because we got a work item to replace those cables; so somebody had looked at them.

Q And that request came from where?

A To the best of my recollection, it came from Marlin over

here. It was written on a work order to change those cables.

Q Other than that inspection, did you conduct any form of inspection during 1980 of the cabling system on an unscheduled basis?

A Other than probably standing on the deck and looking at the cables from the

deck.

Q What would you do when you would be doing that? What would you be looking for?

A Loose or broken or hanging cables. If it was hanging down, it would have been obvious.

Q How many riggers did Hawaiian Marine Lines or Columbia Marine Lines have in its employ in 1980?

A We have no regulars in our employ.

Q When you refer to riggers in the industry, what do riggers do?

A Riggers basically, they don't all work for shipyards, by the way, but riggers primarily work in ship repair. The riggers in the shipyards are the experts in the yard moving heavy loads with cranes or in rigging up cable systems and this type of thing.

Q Is that a specialty in and of itself?

A Yes, it's a specialty. It's a craft

of its own.

Q And what riggers did Crowley Maritime or Hawaiian Marine Lines use?

A We used WISCO in this particular case.

A Yes.

Q During that time period, do you remember any incident of a turnbuckle unloosening?

A No.

Q Or separating?

A No.

Q Were there any problems with respect to jamming?

A No.

Q Do you recall any incident of the turnbuckle slacking to the point where the cargo doors could not be opened?

A No.

Q Would you have remembered?

A I think I would remember that, yes.

Q Now, at the times that you were there when the cargo doors were opened, you did a visual inspection? I'm sorry. Let me ask you this. What kind of inspection, if any, did you do with the cable and the turnbuckle system during the time period November-December of 1980?

A When the barge comes in in the morning, when we want to start the barge, what we do is stand on the deck before you tell the longshoreman and the stevedore to pull on the doors. You just look up and make sure that nothing was hanging or jumbled up up there; and, if that was okay, you go ahead.

Q What about inspection? Do you look at every piece of the swedge?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VI OF VII VOLUMES

PAGES 734-851

DATE: June 3, 1986

pulling, all it does then is it wants to go in that direction. Torquing is when the cable, because it is wound up on a unit or something, then it tends to twist; and, as it twists, even if the jam nut appears to be tight, if you try to turn in against the jam nut, you don't go anywhere. But, if you turn it against the jam nut, then it backs it off because the jam nut does not preclude unloosening in the true sense; because, once you get pulling, you're stretching the bolt. It takes the tension off the jam nut. It interfaces between the bottom of the nut and the shoulder of the bottom. You lessen that, reduce that frictional characteristic, the jam nut has no more function. It does not preclude now from reeling off, from moving, and that's why a jam nut is placed on here just to show what it did and what it doesn't do.

Q What effect would whipping the cable do, if you're back of a cable? What effect would you have on this cable or turnbuckle if you would try to whip it?
A Well, vibration is an engineering study. It shows that most fasteners come loose due to vibration. You can study fasteners in shipping from the East Coast to Alaska, pieces in the electronic industry, in a power transformer, all drop off by the time it gets to Alaska; because, even with lock washers, if they are improperly torqued, they will drop off, and I have seen hundreds of pieces drop off as a result of vibration going across country.

Q Mr. Wong, can you show the Court as to what would happen in terms of any torquing motion on that?
A Okay. If there is any torquing as a

result, then what happens is, if you turn, if you move the unit, then you tend to loosen up; and, as you rotate and if it's fastened on slightly, then potentially what you can do is you will back off the cable. In this case, it doesn't take much to back it off; but not knowing that you're only in a thread or two, you still have enough strength to pull on a roller, because there is nothing until at a certain point you get this, and at that point, once you vibrate and turn it off, then it comes off, and it only took about a turn, one revolution.

So you've still got holding power even with that one thread, and there is also a function of how well the threads are formed and these threads have been corroded, so therefore it takes even less to come loose.

Q Mr. Wong, what is meant by the term

frictional characteristic?

A Okay. Coefficient of friction is a dimensional value. It is just a number. Generally it is less than one. So what you do is, like the tire, when you skid a tire, you have an average; we use a point seven. The test might show point eight. Well, if you take the weight, the normal weight, perpendicular weight to the surface, multiply that by the friction value, then it tells you how much it takes to slide

822

THE COURT: This is my question. What would stop the door from moving?

THE WITNESS: Now, until yesterday and today which you demonstrated in court, I did not know that that was the system of Mr. Tanaka. My impression has always been that there

was a whipping, and today you showed in court to me that he actually untwisted the cable.

THE COURT: I didn't mean to do it. I didn't mean to show that, if that's what you inferred.

THE WITNESS: That's what I saw as well as what Mr. Jim On described to me as turning the cable, both cables, which then to me indicates that the cables for some reason got crossed over each other. If you had to untangle... . Because the cable system, if it is straight, it is parallel. The only way is when you develop a loop and the cable, due to unwinding characteristics, wraps itself up in such a manner that they couldn't pull itself against itself. That's what it implies to me when I heard that he tried to twist the two cables.

THE COURT: I'm not sure we have any evidence to that.

MR. NAGLE: Your Honor, may I note an objection that he is assuming facts not in evidence.

THE COURT: Yeah. I understand that. I'm not sure we have any evidence of that, Mr. Wong. I'm sorry if I gave

belt, or a cage that can either be hoisted with a crane or a different type of cage that can be lifted with a forklift or a hyster.

Q What is your understanding of safety belts and its use as it existed back in 1980 at the time of the accident?

A Safety belts have been available for years, and we even use them on occasion, when you have to work in a position that exposes you to danger. The safety belt is very simple to use. It is strictly a very secure belt around the waist. There are a number of different designs--they

are three-four-five feet long--and they have a snap at the end.

MR. JIM ON: Your Honor, with this Court's permission, I have not marked the safety belt. I was going to use this as an exemplar for the Court's illustration.

THE COURT: Go ahead.

MR. JIM ON: For the record, may the record note that I am handing the individual what is a safety belt.

THE COURT: The record will note you handed it to Mr. Smith.

MR. JIM ON: May the record note I'm handing it to Mr. Smith.

Q Can you identify the object that I have placed before you and describe it?

A Yes. The object before me is what is commonly known as a safety belt. It's a reinforced nylon belt that one would

put around your waist or around your chest, and it has what we call large D rings secured to the belt. It has about a three-and-a-half or four-foot nylon pendant to which is attached a snap hook at the outboard end.

Q Basically, I wonder if you could stretch that exhibit out and indicate to the Court... . Well, we can see the part that relates. You're putting it around your waist, but could you show us the length of that safety belt?

A (Witness complied)

Q What is on the end? There appears to be a ring on the end.

A Okay. This is what would be the attached what some would call the D ring or the I ring.

Q And what would be the relationship of the I ring to the object that you're holding in your left hand?

A Okay. This is the snap hook, and the snap hook can either be attached to something such as a padeye or a stanchion or fitting, or the pendant can be looped around and brought back into the D ring, and this is the most common way of doing it if you're close to something that you can attach to.

Q Do you know whether or not this type of safety device which you have identified as a belt was available to Castle and Cooke employees back in 1980?

A Yes, I've seen them use it.

Q And you have seen Castle and Cooke employees in fact

using that very same safety belt around that time, is that correct?

A A belt similar to that, yes.

Q Now, could you describe any other type of application to the safety belt as

you know or as you have... . Strike that question. Can you describe the applications of the safety belt as relates to how you know, I'm sorry, as it relates to stevedoring practices you have experienced?

A Well, the most common place that we see it used is when stevedores have to approach a situation where there is not good footing or that they have to hang over the edge or something to secure a line. We have seen some real difficult things to hook up to a crane where they had to climb aloft. Those are probably the most common places that you see stevedores using the safety belt.

At Matson, in climbing over two containers high, the company does require that their employees do use the safety belt.

Q When you say containers, how high is the usual container?

A One container is eight feet, so anything over the first container, they want their employees to use the safety belt.

Q Now, are there any other applications to a safety belt aside from containers and situations that you have described? Are there other circumstances that may involve difficult lifts?

A Well, we are all very common or we have commonly seen the

telephone lineman, and all the telephone linemen use a safety belt that's quite similar to this when they are going up on a telephone pole, and you see them with a belt around their waist and they get up on the telephone pole and they wrap the pendant around he pole and they keep that going up with them; so that, should they slip or fall, they don't go all the way

to the ground. That's probably the most common place where the layman would see the belt used. But most anyone working on an offshore platform or large offshore sailboats, safety belts or harnesses are very common, but you see them all the way through the industry.

The window washer that you see washing the windows of a large building, he is using a safety belt not much different than this; and so it's very common in the industry.

Q Thank you very much, Mr. Smith. My final question to you is: Throughout the course of the time of the trial we have been using the phrase or the phrase has been used "one hand for the ship, one hand for yourself." Are you familiar with that phrase?

MR. NAGLE: Objection, your Honor. First of all, we haven't been using it throughout the trial; and I

don't see how it is really relevant or material to this matter.

THE COURT: He may answer.

A Yes. The term is a very old one and a very common one, and we use it quite often in joking even. But it really refers

to, if you're getting yourself in any position where you're off balance or working in an area where there is any danger at all, you work with one hand at the most and you keep one hand firmly onto something. You never use two hands for the job while in a dangerous position.

THE COURT: You could if you had a safety belt.

THE WITNESS: You can if you have a safety belt,

but not if you don't have a safety belt,

your Honor, or if you have other safety equipment. But even working aboard a vessel, it is very, very common that you always maintain one hand for your grip, you know, to maintain your balance wherever you are and one hand to work with, but you never let completely go if you're in a dangerous position.

Q This practice that you have noted of one hand for the ship and one hand for yourself, is this something that is restricted to those involved in maritime work, such as the vessel operator; or do you know, is it so wide spread as to apply to those who are involved in the stevedoring industry?

A It would be anyone engaged--and I don't think the term applies only to the maritime industry, although, at best I know, the term generates from the old sailing ships... .

THE COURT: Just a minute now.

Mr. Jim On, you are now really asking him to express an opinion here, and so I'm going to cut it off. What the terms means is one thing but... .

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VII OF VII VOLUMES

PAGES 851-End

DATE: June 4, 1986

I, Dianna W. Orndoff, Certified Shorthand Reporter, Honolulu, Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 82-0176, DONALD L. KONG, et al. vs. HAWAIIAN MARINE LINES, INC., held in the United Stated District Court, District of Hawaii, Honolulu, Hawaii, on May 22-23, 28-30, June 3 and 4, 1986, before the Honorable Charles L. Hardy, Judge.

September 2, 1986

/s/ Dianna W. Orndoff CSR #170

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

DEPOSITION OF
GEORGE N. CHOCK, JR.
Taken on behalf of the Defendant
Hawaiian Marine Lines, Inc.

PAGES 1-29

DATE: July 24, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DONALD L. KONG and MAY S. M. KONG,	)	
Plaintiffs,	)	
vs.	)	CIVIL NO. 82-0176
HAWAIIAN MARINE LINES, INC., et al.,	)	
Defendants.	)	

DEPOSITION OF GEORGE N. CHOCK, JR.

Taken on behalf of Defendant Hawaiian Marine Lines, Inc. at the office of Kidani, Oshima & Wong, 300 Stanford Court, 233 Merchant Street, Honolulu, Hawaii, commencing at 9:17 a.m. on Tuesday, July 24, 1984, pursuant to Notice. BEFORE:

Barbara McLean, Certified Shorthand Reporter
Notary Public, State of Hawaii

APPEARANCES:

For Plaintiffs:

WALTER S. KIRIMITSU, ESQ.
Shim, Sigal, Tam & Naito
Suite 900, 333 Queen Street
Honolulu, Hawaii 96813

For Defendant
Hawaiian Marine Lines, Inc.:

SHELTON JIM ON, ESQ.
Kidani, Oshima & Wong
300 Stanford Court
233 Merchant Street
Honolulu, Hawaii 96813

1A

For Castle & Cooke
Terminals Limited:

MURIEL M. TAIRA, ESQ.
Char, Hamilton,
Campbell & Thom
Suite 2100, Mauka Tower
Grosvenor Center
737 Bishop Street
Honolulu, Hawaii 96813

21

A No.

Q Do you know of or are you aware of any complaints prior to December 24, 1980 about the conditions of the barge house doors or about any condition on the barge

itself, complaints from your men or from Castle & Cooke Terminal employees; are you aware of any?

A I wasn't aware of any.

Q Have you had any contact with any Hawaiian Marine Lines employees?

A No.

Q The safety equipment that was issued, were you issued any particular safety equipment?

A What do you mean by safety equipment?

Q Like hard hats.

A That we have.

Q You were required to wear that --

A On the job.

Q -- on the job at all times?

A At all times.

Q And you were required to purchase your own safety shoes?

A Safety shoes.

Q What about safety belts?

A Safety belts the company provides

that whenever it is necessary.

Q What were the safety belts used for?

A For heights.

Q Any kind of heights or any time you climbed?

A Yes.

Q The ladders that you mentioned, where were the ladders stored?

A Usually if we have an operation, say, they inspect the ship, whatever, whatever equipment that we need for that operation would be there, you know, when we start that operation. The couper takes care of that like the ladders or whatever.

Q Are there ladders that can take you up to 12 feet or more?

A Say, usually the ladders we use are one container height so that would be about 13 feet. Other than that if it was higher than that we usually use the

personnel carrier.

Q Where is the personnel carrier, where is that usually located?

A Right on the wharf.

Q When you say on the wharf where in particular on the wharf?

A Well, close to whatever job you are doing.

Q Say for example if the barge OAHU came in.

A The barge always parks and the personnel carrier

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

DEPOSITION OF
ROBERT PIATT
Taken on behalf of the Plaintiffs

PAGES 1-76

DATE: August 20, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

DONALD L. KONG and MAY S. M. KONG,	)	
Plaintiffs,	)	
vs.	)	Civil No. 82-0176
HAWAIIAN MARINE LINES, INC.,a Delaware corporation; WILLAMETTE IRON AND STEEL COMPANY and GUY F. ATKINSON COMPANY,	)	
Defendants.	)	
and	)	
CASTLE & COOKE TERMINALS, LIMITED and NATIONAL UNION FIRE INSURANCE COMPANY,	)	
Intervenors,	)	
and	)	
HAWAIIAN MARINE LINES, INC.,	)	
Defendant and Third-Party Plaintiff,	)	
vs.	)	

WILLAMETTE IRON AND STEEL COMPANY and GUY F. ATKINSON COMPANY,	)
Third-Party Defendant.	)

DEPOSITION OF ROBERT PIATT
Taken in behalf of the Plaintiff

August 20, 1985
Portland, Oregon

BE IT REMEMBERED that the deposition of ROBERT PIATT was taken in behalf of the Plaintiffs, pursuant to the Federal Rules of Civil Procedure, before Terri J. Mundt, Registered Professional Reporter and Notary Public for Oregon, on Tuesday, the 20th day of August, 1985, at the Marriott Hotel, Portland, Oregon, beginning at the hour of 9:45 a.m.

APPEARANCES

SHIM, TAM, KIRIMITSU & NAITO
By: Mr. Walter S. Kirimitsu, appearing in behalf of the Plaintiffs;

KIDANI, OSHIMA & WONG
By: Mr. Grant K. Kidani, appearing in behalf of Defendant and Third Party Plaintiff, Hawaiian Marine Lines;

BURKE, SAKAI, McPHEETERS, BORDNER & GILARDY
By: Mr. James T. Estes, Jr., appearing in behalf of Third Party Defendants Willamette Iron & Steel and Atkinson.

ALSO PRESENT

Mr. Bob Schile

Q Why not?

A Because they are not used on a routine basis like the internal turnbuckles are. The turnbuckles internally have to be put on and taken off each time the door is opened or closed.

Q Now, once again, these are like routine preventive maintenance steps that Hawaiian Marine Lines takes. Is that every time it comes in to Portland?

A To the best of my knowledge, time permitting, almost every time they grease the door sheaves and check the turnbuckles, yes. The engine is always serviced. That is routine. Deck winches are greased; that is routine. Towing gear is looked at; that is routine.

Q Is there anything done to check the doors as to whether or not they are aligned properly so that the bolts fit

properly?

A Not by us. That is usually by the cargo supervisor. If he has a problem with the doors he will call and tell us, "Hey, I need some help in pulling the turnbuckles up," something like that.

Q In Portland the cargo supervisor would be whom?

A Again, John Lanagan or one of his men.

Q Now, getting back to the work order, and I'm referring to the one dated October 24, 1981 that you have there in front of you: once this work order is prepared is there any

No. _____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

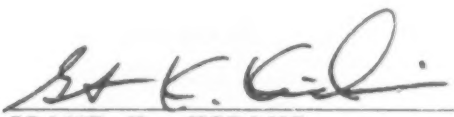
CERTIFICATE OF SERVICE

I, Grant K. Kidani, a member of the Bar of this Court, hereby certify that on November 20, 1987 . three copies of the Brief of Respondent Hawaiian Marine Lines, Inc. in Opposition to Petition for Writ of Certiorari in the above-entitled case were served by personal delivery upon the following at the address shown below:

WALTER S. KIRIMITSU, ESQ.
HENRY N. KITAMURA, ESQ.
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
Attorneys for Petitioners

JAMES T. ESTES, JR.
3100 Mauka Tower
Grosvenor Center
737 Bishop Street
Honolulu, Hawaii 96813
Attorney for
WILLAMETTE IRON & STEEL CO.
and GUY F. ATKINSON CO.

I further certify that all parties required to be served have been served.



GRANT K. KIDANI
KYLE A. THOMPSON

KIDANI - CRUDELE
300 Stanford Court
233 Merchant Street
Honolulu, Hawaii 96813
(808)521-0933

Counsel for Respondent
HAWAIIAN MARINE LINES, INC.